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No.

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725, contravenes constitutional principles of federalism.

PARTIES TO THE PROCEEDING

Petitioners are the Attorney General of the United States and the United States of America.

Respondents are the Attorney General for the State of South Carolina, the State of South Carolina, the South Carolina Press Association, the Virginia Press Association, the West Virginia Press Association, the Maryland/Delaware/District of Columbia Press Association, the Newspaper Association of America, and the American Society of Newspaper Editors.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States and the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-37a) is reported at 155 F.3d 453. The opinion of the district court (App., *infra*, 38a-72a) is reported at 972 F. Supp. 977.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1998. A petition for rehearing was denied

on December 22, 1998. App., *infra*, 73a-74a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power * * * To regulate Commerce * * * among the several States."

2. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. The Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725, is reprinted in an appendix to this petition (App., *infra*, 75a-81a).

STATEMENT

1. This case involves a constitutional challenge brought by the State of South Carolina to the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. 2721-2725, which restricts disclosure of personal information from state motor vehicle records.[1] An individual who

[1] The DPPA was enacted as part of an omnibus crime control law, the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. XXX, § 300002, 108 Stat. 2099. The Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee held hearings on the DPPA on February 3 and 4, 1994. Those hearings were never printed, and we are informed by the Clerk of the Judiciary Committee that the Committee no longer has documents or transcripts relating to the DPPA hearings. The principal prepared submissions to the Subcommittee are available on Westlaw. See *Protecting Driver Privacy: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 2d Sess., *available at* 1994 WL 212813, 212822, 212833, 212834, 212835, 212836, 212696, 212698, 212701, 212712, 212720 (Feb. 3-4, 1994).

seeks a driver's license from his State's department of motor vehicles (DMV) is generally required to give the state agency a range of personal information, including the driver's name, address, telephone number, and in some cases medical information that may bear on the driver's ability to operate a motor vehicle. In some States, the DMV also requires a driver to provide his social security number and takes a photograph of the driver. State DMVs, in turn, routinely sell this personal information to individuals and businesses.[2] Although DMVs generally charge only a small fee for each particular sale of information, aggregate revenues are substantial. For example, New York's motor vehicle department earned $17 million in one year from individuals and businesses that used the State's computers to examine driver's license records. See 1994 WL 212813 (Feb. 3, 1994) (statement of Janlori Goldman, American Civil Liberties Union).

The personal information sold by DMVs is also used extensively to support the marketing efforts of corporations and database compilers. See 1994 WL 212836 (Feb. 3, 1994) (statement of Richard A. Barton, Direct Marketing Association) ("The names and addresses of

[2] Representative Moran, a sponsor of the DPPA, observed: "Currently, in 34 States across the country anyone can walk into a DMV office with your tag number, pay a small fee, and get your name, address, phone number and other personal information—no questions asked." 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994); see also 139 Cong. Rec. 29,466 (1993) (statement of Sen. Boxer); *id.* at 29,468 (statement of Sen. Warner); *id.* at 29,469 (statement of Sen. Robb); 1994 WL 212834 (Feb. 3, 1994) (statement of Dr. Mary J. Culnan, Georgetown University); 1994 WL 212813 (Feb. 3, 1994) (statement of Janlori Goldman, American Civil Liberties Union).

vehicle owners, in combination with information about the vehicles they own, are absolutely essential to the marketing efforts of the nation's automotive industry."). This information "is combined with information from other sources and used to create lists for selective marketing use by businesses, charities, and political candidates." *Ibid.* See also 1994 WL 212834 (Feb. 3, 1994) (statement of Dr. Mary J. Culnan, Georgetown University) (describing use of DMV information by direct marketers).

The highly publicized 1989 murder of actress Rebecca Schaeffer brought to light the potential threat to privacy and safety posed by this commerce in motor vehicle record information. Schaeffer had taken pains to ensure that her address and phone number were not publicly listed. Despite those precautions, a stalker was able to track her down by obtaining her home address through her state motor vehicle records. See 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994) (statement of Rep. Moran). Evidence gathered by Congress revealed that that incident was similar to many other crimes in which stalkers, robbers, and assailants had used state motor vehicle records to locate, threaten, and harm victims.[3]

Moreover, Congress received evidence indicating that a national solution was warranted to address the problem of potentially dangerous disclosures of personal information in motor vehicle records. Marshall Rickert, Motor Vehicle Administrator for the State of

[3] See, *e.g.*, 1994 WL 212698 (Feb. 4, 1994) (statement of Rep. Moran); 1994 WL 212822 (Feb. 3, 1994) (statement of David Beatty, National Victim Center); 1994 WL 212833 (Feb. 3, 1994) (statement of Donald L. Cahill, Fraternal Order of Police); 139 Cong. Rec. 29,469 (1993) (statement of Sen. Robb); *id.* at 29,470 (statement of Sen. Harkin).

Maryland, who testified in support of the legislation on behalf of the American Association of Motor Vehicle Administrators, emphasized that technological advances had dramatically increased the accessibility of state motor vehicle records, but that "many state laws have not kept pace with technological advancements, and permit virtually unlimited public access to driver and motor vehicle records." 1994 WL 212696 (Feb. 4, 1994). Accordingly, he urged that "uniform national standards are needed." *Ibid.* In addition, among the incidents brought to Congress's attention were ones in which stalkers had followed their victims across state lines. See 1994 WL 212822 (Feb. 3, 1994) (statement of David Beatty, National Victim Center).

2. Based on evidence about threats to individuals' privacy and safety from misuse of personal information in state motor vehicle records, Congress enacted the DPPA to restrict the disclosure of personal information in such records without the consent of the individual to whom the information pertains. The DPPA does not require any affirmative act by state motor vehicle agencies.[4] Rather, it simply prohibits any state DMV, or officer or employee thereof, from "knowingly dis-

[4] The DPPA does provide that motor vehicle information shall be disclosed to carry out the purposes of the Automobile Information Disclosure Act, 15 U.S.C. 1231 *et seq.*; the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1901 *et seq.*; the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 *et seq.*; the Anti-Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384; and the Clean Air Act, 42 U.S.C. 7401 *et seq.* See 18 U.S.C. 2721(b). This provision makes clear that the DPPA does not bar the States from making disclosures of motor vehicle information required by those other federal statutes. The provision adds no new disclosure requirements beyond those otherwise required by federal law.

clos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. 2721(a).[5] The DPPA defines "personal information" as any information "that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information," but not "information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. 2725(3).

The DPPA bars only nonconsensual disclosures. Thus, DMVs may release personal information for any use, if they provide individuals with an opportunity to "opt-out" from disclosure when they receive or renew their licenses. See 18 U.S.C. 2721(b)(11). In addition, a DMV may release personal information about an individual to a requester if the department obtains consent to the disclosure from the individual to whom the information pertains. See 18 U.S.C. 2721(d). A DMV also may disclose information about an individual if the requester has that individual's written consent. 18 U.S.C. 2721(b)(13).

The DPPA explicitly disclaims any restriction on the use of motor vehicle information by "any government agency," including a court, and also "any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." 18 U.S.C. 2721(b)(1). It also expressly permits DMVs to disclose personal information for any state-authorized purpose

[5] A "motor vehicle record" is defined as "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." 18 U.S.C. 2725(1).

relating to the operation of a motor vehicle or public safety. 18 U.S.C. 2721(b)(14).

The DPPA does not preclude States from disclosing personal information for other uses in which Congress found an important public interest. Thus, States may disclose personal information in their motor vehicle records for use in connection with car safety or theft, driver safety, and other motor-vehicle related matters, 18 U.S.C. 2721(b)(2); by a business to verify the accuracy of personal information submitted to that business, and further to prevent fraud or to pursue legal remedies if the information the individual submitted to the business is revealed to have been inaccurate, 18 U.S.C. 2721(b)(3); in connection with court, agency, or self-regulatory body proceedings, 18 U.S.C. 2721(b)(4); for research purposes, if the personal information is not further disclosed or used to contact the individuals, 18 U.S.C. 2721(b)(5); by insurers in connection with claims investigations, anti-fraud activities, rating, or underwriting, 18 U.S.C. 2721(b)(6); to notify owners of towed or impounded vehicles, 18 U.S.C. 2721(b)(7); by licensed private investigative agencies or security services for permitted purposes, 18 U.S.C. 2721(b)(8); by employers to verify information relating to a holder of a commercial driver's license, 18 U.S.C. 2721(b)(9); for use in connection with private tollways, 18 U.S.C. 2721(b)(10); and in certain circumstances for bulk distribution for surveys, marketing, or solicitation, if individuals are provided an opportunity, "in a clear and conspicuous manner," to prohibit such use of information pertaining to them, 18 U.S.C. 2721(b)(12).

The DPPA also regulates the resale and redisclosure of personal information obtained from state DMVs, 18 U.S.C. 2721(c), and prohibits any person from knowingly obtaining or disclosing any record for a use not

permitted by the DPPA, or providing false information to a state agency to circumvent the DPPA's restrictions on disclosure, 18 U.S.C. 2722(a). The States have no obligation themselves to regulate the use of information obtained under the Act or to pursue legal remedies against any requester who obtains or uses information in violation of the Act.

Finally, the DPPA sets forth penalties and civil remedies for knowing violations of the Act. Any "person" (defined to exclude any State or state agency) who knowingly violates the DPPA may be subject to a criminal fine. 18 U.S.C. 2723(a), 2725(2). A state agency that maintains "a policy or practice of substantial noncompliance" with the DPPA may be subject to a civil penalty imposed by the Attorney General of not more than $5000 per day for each day of substantial noncompliance. 18 U.S.C. 2723(b). Any person who knowingly obtains, discloses, or uses information from a state motor vehicle record for a use not permitted by the DPPA may also be subject to liability in a civil action brought by the person to whom the information pertains. 18 U.S.C. 2724.

3. South Carolina law provides that the Motor Vehicle Division of the Department of Public Safety will release information contained in its motor vehicle records to anyone, provided that the requester fills out a form listing his name and address and stating that the information will not be used for telephone solicitation. S.C. Code Ann. §§ 56-3-510 to 56-3-540 (Law. Co-op. Supp. 1998). The Department of Public Safety is authorized to charge a fee for the release of requested information. *Id.* § 56-3-530. Accordingly, South Carolina law appears to permit disclosures for uses broader than those permitted by the DPPA.

South Carolina brought this action in federal district court, alleging that the DPPA exceeds Congress's constitutional powers, and seeking an injunction against enforcement of the DPPA. The district court granted summary judgment for the State and entered a permanent injunction against the Act's enforcement. App., *infra*, 39a-40a.

The district court ruled that this case was controlled by *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997). The district court found the DPPA similar to the federal statutes invalidated in *New York* and *Printz* because, it believed, "[i]n enacting the DPPA, Congress has chosen not to assume responsibility directly for the dissemination and use of these motor vehicle records. Instead, Congress has commanded the States to implement federal policy by requiring them to regulate the dissemination and use of these records." App., *infra*, 53a.[6]

4. a. A divided panel of the court of appeals affirmed. App., *infra*, 1a-37a. The majority did not express doubt that disclosure and use of personal information held by state DMVs could be considered "commerce" within the scope of Congress's regulatory power under the Commerce Clause of the Constitution. U.S. Const. Art. I, § 8, Cl. 3. The court noted, however, that Congress "is constrained in the exercise of that [commerce] power by the Tenth Amendment. Thus, the question * * * is not whether the DPPA regulates commerce, but whether it is consistent with the system of dual sovereignty established by the Constitution." App., *infra*, 8a.

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[6] The district court also rejected Section 5 of the Fourteenth Amendment as a basis for Congress's power to enact the DPPA. App., *infra*, 56a-72a.

The majority acknowledged that "the DPPA is different in several respects from the statutes struck down in *New York* and *Printz*." App., *infra*, 14a. "Unlike the federal statute in *New York*, the DPPA does not commandeer the state legislative process. In particular, the DPPA does not require the States to enact legislation regulating the disclosure of personal information contained in their motor vehicle records." *Ibid.* Further, the court recognized that, unlike the statute invalidated in *Printz*, "the DPPA does not conscript state officers to enforce the regulations established by Congress. Indeed, the DPPA does not require that state officials report or arrest violators of the DPPA." *Ibid.* The court nonetheless concluded that "state officials must * * * administer the DPPA," and stated that *New York* and *Printz* had made "perfectly clear that the Federal Government may not require State officials to administer a federal regulatory program." *Ibid.* It rejected the government's contention that *New York* and *Printz* govern only the situation where the federal law in question "requires a State to regulate the behavior of its citizens." *Id.* at 15a.

Even on the assumption that the government's reading of *New York* and *Printz* was correct, however, and that the DPPA does not require the States to regulate the behavior of its citizens, the court still found the DPPA unconstitutional. The majority rejected the government's contention that the DPPA could be sustained under cases such as *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which upheld federal regulation of activities of the States affecting commerce. It believed that *Garcia* established a broad *limit* on Congress's power to regulate state activity: "Under *Garcia* and its progeny, Congress may only 'subject state governments to generally

applicable laws.'" App., *infra*, 15a (quoting *New York*, 505 U.S. at 160). Under the court's reading of *Garcia*, that decision did not govern this case because the DPPA by definition can apply only to state agencies:

> [T]he DPPA exclusively regulates the disclosure of information contained in state motor vehicle records. Of course, there is no private counterpart to a state Department of Motor Vehicles. Private parties simply do not issue drivers' licenses or prohibit the use of unregistered motor vehicles. Thus, rather than enacting a law of general applicability that incidentally applies to the States, Congress enacted a law that, for all intents and purposes, applies *only* to the States.

App., *infra*, 17a.

The panel recognized that other federal statutes prevent private parties from disclosing personal information in various circumstances. App., *infra*, 18a. It regarded that point as irrelevant, however, because, even though Congress had regulated similar activity by private citizens in other federal statutes, it had not regulated private citizens' use and disclosure of personal information in the DPPA itself:

> Under *Garcia*, a statute is constitutional only if it *is* generally applicable. A law is not generally applicable simply because it *could be* generally applicable. That Congress could subject private parties to the same type of regulation is irrelevant to the Tenth Amendment. Congress may invade the sovereignty of the States only when it actually enacts a law of general applicability. Nothing short of that will pass constitutional muster.

Ibid.[7]

b. Judge Phillips dissented. He concluded that the Commerce Clause provides a sufficient constitutional basis for Congress's authority to enact the DPPA. App., *infra*, 27a-37a. Judge Phillips stressed that "the end object of the [DPPA] is the direct regulation of state conduct[,] * * * not the indirect regulation of private conduct * * * by forcing the states directly to regulate that conduct." *Id.* at 29a. He concluded this "direct regulation of State activity * * * distinguishes the DPPA, in the most fundamental of ways, from the federal legislation struck down respectively in *New York* and *Printz*." *Id.* at 30a.

Judge Phillips also contested the majority's reading of *Garcia* as limiting congressional power to situations in which Congress subjects state conduct to laws of general applicability. App., *infra*, 31a-32a. Although Judge Phillips noted that the statutes upheld in *Garcia* and similar cases, such as *EEOC* v. *Wyoming*, 460 U.S. 226 (1983), were laws of general applicability, in that they regulated activities of both state and private actors, he explained that those laws were held constitutional "not so much—if at all—because they applied equally to state and private actors as because they directly regulated state activities rather than using the 'States as implements of regulation' of third parties." App., *infra*, 32a (quoting *New York*, 505 U.S. at 161). And, he suggested, the DPPA "does nothing different from, for example, that done by federal regulation of municipal sewage and state-owned solid waste disposal systems," or "federal regulation of state-owned liquor

[7] Like the district court, the majority of the court of appeals rejected the Fourteenth Amendment as a source of Congress's power to sustain the DPPA. App., *infra*, 22a-26a.

monopolies or lottery facilities. Surely it is no basis for invalidating such regulations that no private equivalent could be found in the particular area of regulation." *Id.* at 36a, 37a.

c. The panel denied the government's petition for rehearing, and the full court denied the government's suggestion of rehearing en banc by a vote of seven to six. App., *infra*, 73a-74a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case to review "the exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). The Fourth Circuit has invalidated the Driver's Privacy Protection Act of 1994 (DPPA) on its face, as violative of the constitutional structure of federalism. Moreover, the court of appeals' decision conflicts directly with the decisions of two other courts of appeals that have upheld the DPPA and have expressly rejected the Fourth Circuit's analysis. *Travis* v. *Reno*, 163 F.3d 1000 (7th Cir. 1998); *Oklahoma* v. *United States*, 161 F.3d 1266 (10th Cir. 1998).[8] In addition, the Fourth Circuit's articulation of the limits on congressional power under the Commerce Clause to regulate state activity is erroneous and may have far-reaching implications for other congressional efforts to regulate commercial activity in which States engage. Review by this Court is therefore warranted.

1. In several fields, Congress has identified a problem in the dissemination of, and commerce in, personal information without the consent of the individual to

[8] Rehearing has been denied in both *Travis* and *Oklahoma*. Another constitutional challenge to the DPPA is still pending before the Eleventh Circuit. See *Pryor* v. *Reno*, No. 98-6261 (argued Nov. 30, 1998).

whom the information pertains, and has acted to restrict and regulate such disclosure and commerce. In the context of information held by private enterprises, Congress has enacted statutes that restrict nonconsensual disclosures of personal information held by video stores, cable television companies, credit bureaus, and electronic communications services.[9] Congress has also restricted disclosures of personal information by the federal government.[10] In much the same way, the DPPA regulates the disclosure of personal information by state DMVs.[11]

There can be no serious dispute that personal information held by state agencies and sold to requesters or made available to requesters for further use in interstate commerce is a proper subject of regulation pursuant to Congress's power under the Commerce Clause. Indeed, the court of appeals did not suggest otherwise. The sale of information by state DMVs generates significant revenues for the States and is integral to the operations of the national direct marketing industry. See pp. 3-4, *supra*; *Travis*, 163 F.3d at 1002. Such information is therefore legitimately subject to federal regulation as a "thing[] in interstate commerce," and its

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[9] See Video Privacy Protection Act of 1988, 18 U.S.C. 2710; Cable Communications Policy Act of 1984, 47 U.S.C. 551; Fair Credit Reporting Act, 15 U.S.C. 1681b; Electronic Communications Privacy Act of 1986, 18 U.S.C. 2702.

[10] See Privacy Act of 1974, 5 U.S.C. 552a (1994 & Supp. III 1997); 26 U.S.C. 6103 (1994 & Supp. II 1996) (confidentiality of tax returns); 13 U.S.C. 9 (confidentiality of census data).

[11] Representative Moran, one of the Act's principal sponsors, explained at a hearing that the DPPA's provisions for allowing individuals to provide consent to disclosure in advance were taken from the Video Privacy Protection Act of 1988. See 1994 WL 212698 (Feb. 4, 1994).

dissemination is also legitimately subject to Congress's Commerce Clause power as an activity "having a substantial relation to interstate commerce." See *United States* v. *Lopez*, 514 U.S. 549, 558, 559 (1995); see also *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 538 (1985); *EEOC* v. *Wyoming*, 460 U.S. 226, 235-236 (1983).

The court of appeals nonetheless concluded that, under constitutional principles of federalism, Congress may not employ its power under the Commerce Clause to regulate state activity in or affecting commerce unless that regulation is effected pursuant to a "law of general applicability," *i.e.*, a single statute that applies both to state activity and also to essentially identical activity undertaken by private enterprises. App., *infra*, 18a. The court drew this supposed rule from this Court's decision in *Garcia*, which it read to establish that "Congress may only subject state governments to generally applicable laws." *Id.* at 15a (internal quotation marks omitted). This Court's decisions, however, establish no such principle.

This Court has held that it is *permissible* for Congress to regulate activity in or affecting commerce undertaken by the States in circumstances where Congress has also regulated similar activity undertaken by private enterprises. See, *e.g.*, *Garcia*, *supra*; *EEOC* v. *Wyoming*, *supra*. The reason why such an exercise of congressional power is permissible, however, is not that in such cases Congress has simultaneously addressed activity undertaken by both state and private actors. Nor has it anything to do with the formal structure of the law passed by Congress—namely, that Congress enacted regulation of both private and state activity in the same piece of legislation rather than in separate laws. Rather, the exercise of congressional authority to

regulate state activity in or affecting commerce is permissible because, by its nature, it does not impinge on the residual sovereignty that the States retain under the Constitution. As Judge Phillips explained, the statutes challenged in *Garcia* and *Wyoming* were upheld "because they directly regulated state activities rather than using the 'States as implements of regulation' of third parties." App., *infra*, 32a (quoting *New York* v. *United States*, 505 U.S. 144, 161 (1992)). Those statutes were therefore found to be consistent with the system of dual sovereignty established by the Constitution, which "authorizes Congress to regulate interstate commerce directly," including activities undertaken by state agencies that are in or that affect interstate commerce, even if "it does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166.

The same is true where (as here) Congress regulates state activity in or affecting commerce under a law directed only at that particular activity. Congress might decide that a particular danger affecting interstate commerce arises from the sale or dissemination of information held only in the hands of state agencies; or it might decide that the danger, although roughly analogous to a similar danger posed by misuse of information in private hands, is sufficiently different that it should be addressed in a statute designed for and directed at the matter at hand. The Commerce Clause does not require Congress to impose blanket regulations governing the dissemination and sale of personal information in all sectors, nor does it deny to Congress the flexibility of addressing the concerns raised by such disclosures and sales on a sector-by-sector basis, including giving consideration to whatever factors might weigh in favor of particular exemptions in particular contexts

warranting disclosure. Whatever underlay Congress's decision in the DPPA to address disclosures and sales of personal information by state agencies separately, that decision does not somehow render Congress's otherwise unobjectionable regulation of commerce improper. It remains true that, when Congress directly regulates an activity in or affecting interstate commerce undertaken by a state agency, it regulates commerce, not the State's regulation of commerce. As the Seventh Circuit observed, the DPPA "affects states as owners of databases; it does not affect them in their role as governments." *Travis*, 163 F.3d at 1004.

2. This Court's decisions also establish that Congress may not "command[eer]" the States either by requiring them "to enact or enforce a federal regulatory program" or by "conscripting the States' officers directly" in the enforcement of federal law. *Printz* v. *United States*, 521 U.S. 898, 935 (1997); see *New York*, 505 U.S. at 188. The court of appeals acknowledged that the DPPA requires neither that the States enact legislation nor that state officials arrest or report violators of the DPPA; rather, the DPPA is enforced entirely through civil penalties and criminal fines sought by the federal government, and through civil causes of action brought against individuals. App., *infra*, 14a. Nonetheless, the lower court suggested that state officials must "administer the DPPA," and that the DPPA therefore runs afoul of the Court's holdings in *New York* and *Printz* that "the Federal Government may not require State officials to administer a federal regulatory program." *Ibid.* That reading of *New York* and *Printz* is incorrect, and the lower court's decision on that point is directly contrary to this Court's decision in *South Carolina* v. *Baker*, 485 U.S. 505 (1988).

When the Court in *New York* gave force to the constitutional rule that Congress may not "commandeer" the States, it explained that, under the system of dual sovereignty, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." 505 U.S. at 161, 162. The DPPA, however, does not "commandeer" the States' governmental authority in that way. To the contrary, the DPPA "directly regulates the disclosure of [the specified] information," and it makes enforcement "the job of federal officials." *Oklahoma*, 161 F.3d at 1272; accord *Travis*, 163 F.3d at 1005 ("Wisconsin is no more a regulator or law enforcer when it decides what information to release from its database than is the corner Blockbuster Video outlet [when it complies with the Video Privacy Protection Act of 1988]."); App., *infra*, 29a (Phillips, J., dissenting) ("the end object of the Act is the direct regulation of state conduct" rather than "the indirect regulation of private conduct"); cf. *Baker*, 485 U.S. at 514 (the statute "regulates state activities; it does not * * * seek to control or influence the manner in which States regulate private parties").

State officials may, of course, have to take administrative steps to bring their agencies into compliance with the DPPA. The Court has made clear, however, that the necessity of taking such steps to ensure that the States conform to federal law does not amount to "commandeering" of state governments in contravention of the Constitution. As the Court explained in *South Carolina* v. *Baker*: "That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." 485 U.S. at 514-

515. Indeed, if taking administrative steps to ensure compliance with federal law amounted to the forbidden "commandeering," then the Court's decision in *Garcia*, upholding the application of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* (FLSA) to state employment, would be a nullity, "for the FLSA requires states to establish record-keeping systems and to establish mechanisms for paying employees according to a national formula. Every federal law that affects the way states participate in the marketplace may do the same." *Travis*, 163 F.3d at 1003-1004.

Moreover, the DPPA in no way interferes with a State's ability to collect information from its citizens or to use that information for motor vehicle-related or other governmental purposes. See 18 U.S.C. 2721(b)(1) and (14). Also, "[n]othing in the [DPPA] interferes with states' ability to license drivers and remove dangerous ones from the road." *Travis*, 163 F.3d at 1003; accord *Oklahoma*, 161 F.3d at 1272 ("The DPPA neither limits a state's ability to regulate in the field of automobile licensing and registration * * * nor restricts a state's ability to use motor vehicle information in its own regulatory activities."). And, far from imposing affirmative obligations on States, the DPPA simply imposes reasonable federal restrictions on the exercise of state authority. The DPPA thus effectively operates to preempt state law insofar as that state law may allow dissemination of personal information by DMVs in a manner inconsistent with federal law. The system of dual sovereignty established by the Constitution does not prohibit Congress from preempting state law in that manner. See *New York*, 505 U.S. at 167-168, 173-174; *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).

3. Congress enacted the DPPA after receiving evidence that disclosure of information from motor vehicle records had on numerous occasions led to serious, and indeed fatal, threats to individuals' safety. In addition, Congress understood that motor vehicle records are perhaps unique because (1) they constitute a single database, compiled by the States as a condition of engaging in an important function—driving—which unquestionably affects commerce and which is, in practical effect, a necessity of modern life, and (2) because they can be connected to license plates, which the States require individuals to display in public whenever they drive. Thus, the unique concern that Congress found here arises from the fact that individuals are effectively forced to advertise the key to their personal information on their license plate when they drive. As Representative Moran, one of the Act's sponsors, explained: "The key difference between DMV records and other public records comes from the license plate, through which every vehicle on the public highways can be linked to a specific individual. Anyone with access to data linking license plates with vehicle ownership has the ability to ascertain the name and address of the person who owns that vehicle. Other public records are not vulnerable to abuse in the same way." 140 Cong. Rec. H2523 (daily ed. Apr. 20, 1994).

Congress therefore had an ample basis on which to conclude that abuse of motor vehicle records to obtain individuals' personal information for nefarious purposes posed a sufficient threat to individuals' personal safety and autonomy, such that the exercise of its power under the Commerce Clause was legitimate. See *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which

are plainly adapted to that end, which are not prohibited, but consist with letter and spirit of the constitution, are constitutional."). And as the district court observed, South Carolina has offered no state interest in favor of *unqualified* disclosure of personal information in motor vehicle records to place in the balance against the privacy interest that Congress has identified as warranting protection. App., *infra*, 67a.

In sum, the DPPA is a wholly proper regulation of interstate commerce that does not impinge on any aspect of state sovereignty protected by the Constitution. Because the court of appeals has held that Act of Congress unconstitutional in a decision that conflicts with rulings of other courts of appeals, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1999

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97-2554

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA; STATE OF SOUTH CAROLINA, PLAINTIFFS-APPELLEES

AND

SOUTH CAROLINA PRESS ASSOCIATION; VIRGINIA PRESS ASSOCIATION; NORTH CAROLINA PRESS ASSOCIATION; WEST VIRGINIA PRESS ASSOCIATION; MARYLAND/DELAWARE/DISTRICT OF COLUMBIA PRESS ASSOCIATION; NEWSPAPER ASSOCIATION OF AMERICA; AMERICAN SOCIETY OF NEWSPAPER EDITORS, INTERVENORS-PLAINTIFFS

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

BETTER BUSINESS BUREAU, INCORPORATED; STATE OF ALABAMA; STATE OF OKLAHOMA; STATE OF IDAHO, AMICI CURIAE

[Argued: June 2, 1998
Decided: Sept. 3, 1998]

Before: HAMILTON and WILLIAMS, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

OPINION

WILLIAMS, Circuit Judge:

The Attorney General of the State of South Carolina (the State) challenged the constitutionality of the Driver's Privacy Protection Act (DPPA), *see* 18 U.S.C.A. §§ 2721-2725 (West Supp.1998), in the United States District Court for the District of South Carolina on the grounds that it violated the Tenth and Eleventh Amendments to the United States Constitution.[1] The United States defended the DPPA, arguing that it was lawfully enacted pursuant to Congress's powers under both the Commerce Clause and Section 5 of the Fourteenth Amendment. After reviewing the parties' arguments, the district court held that the DPPA violated the Tenth Amendment and permanently enjoined its enforcement in the State of South Carolina. *See Condon v. Reno*, 972 F. Supp. 977, 979 (D.S.C. 1997).

On appeal, the United States first contends that the DPPA was lawfully enacted pursuant to Congress's power under the Commerce Clause. Although Congress may regulate entities engaged in interstate commerce, Congress is constrained in the exercise of that

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[1] In addition to the State's claims, several media organizations (Intervenors), challenged the constitutionality of the DPPA on the grounds that it violated the First Amendment. Because the district court found that the DPPA violated the Tenth Amendment, it had no reason to address the constitutionality of the Act under either the Eleventh Amendment or the First Amendment. *See Condon v. Reno*, 972 F. Supp. 977, 979 n. 3 (D.S.C. 1997). Although neither party raised the Eleventh Amendment issue before this Court, Intervenors moved this Court for leave to file an amicus brief to argue that the DPPA violated the First Amendment. Because that issue was not considered by the district court, Intervenors' motion was denied.

power by the Tenth Amendment. As a result, when exercising its Commerce Clause power, Congress may only "subject state governments to generally applicable laws." *New York v. United States*, 505 U.S. 144, 160, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). The DPPA exclusively regulates the disclosure of personal information contained in state motor vehicle records. Thus, rather than enacting a law of general applicability that incidentally applies to the States, Congress passed a law that, for all intents and purposes, applies *only* to the States. Accordingly, the DPPA is simply not a valid exercise of Congress's Commerce Clause power.

In the alternative, the United States contends that the DPPA was lawfully enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment. When enacting legislation under Section 5 of the Fourteenth Amendment, however, Congress's power "extends only to *enforc[ing]* the provisions of the Fourteenth Amendment." *City of Boerne v. Flores*, —— U.S. ——, ——, 117 S. Ct. 2157, 2164, 138 L. Ed. 2d 624 (1997) (emphasis added). The United States asserts that individuals possess a Fourteenth Amendment right to privacy in their names, addresses, and phone numbers, and that the DPPA enforces that constitutional right. Neither the Supreme Court nor this Court, however, has ever recognized a constitutional right to privacy with respect to such information. Congress is granted a remedial power under Section 5 of the Fourteenth Amendment, not a substantive power. As a consequence, the DPPA is not a valid exercise of Congress's Enforcement Clause power.

Under our system of dual sovereignty, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the

States respectively, or to the people." U.S. Const. amend. X. Because Congress lacked the authority to enact the DPPA under either the Commerce Clause or Section 5 of the Fourteenth Amendment, we affirm the judgment of the district court.

I.

As recited by the district court, the pertinent facts are as follows:

> Congress enacted the DPPA in 1994 in an effort to remedy what it perceived to be a problem of national concern: *i.e.*, the active commerce in, and consequent easy availability of, personal information contained in State motor vehicle records. Testimony before Congress established that as many as 34 States allowed easy access to personal information contained in motor vehicle records and that criminals had used such information to locate victims and commit crimes. Congress also found that many States sell or other wise permit the use of information contained in motor vehicle records for direct marketing purposes.
>
> The DPPA, which [was] scheduled to become effective on September 13, 1997, generally prohibits "a State department of motor vehicles, and any officer, employee, or contractor, thereof, [from] knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. § 2721(a). The DPPA specifies a list of exceptions when personal information contained in a State motor vehicle record may be obtained and used. *See* 18 U.S.C. § 2721(b).

> Additionally, the DPPA permits State motor vehicle departments to:
>
> > [E]stablish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in [§ 2721(b)], may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under [§ 2721].
>
> 18 U.S.C. § 2721(d). The DPPA also prohibits "any person [from] knowingly . . . obtain[ing] or disclos[ing] personal information, from a motor vehicle record, for any use not permitted under section 2721(b)," 18 U.S.C. § 2722(a), and from "mak[ing] false representation to obtain any personal information from an individual's motor vehicle record." 18 U.S.C. § 2722(b).
>
> The DPPA provides that "[a]ny State department of motor vehicles that has a policy or practice of substantial noncompliance . . . shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance." 18 U.S.C. § 2723(b). The DPPA also creates a criminal fine, 18 U.S.C. § 2723(a), and a civil cause of action against a "person" who knowingly violates it. 18 U.S.C. § 2724(a).
>
> South Carolina currently has its own statutory provisions regarding the disclosure and use of its

motor vehicle records, and South Carolina's scheme differs significantly from the DPPA. *See* S.C. Code Ann. §§ 56-3-510 -540. Under South Carolina law a person who requests information contained in South Carolina's motor vehicle records must submit the request on a form provided by the State Department of Public Safety ("the Department") and must specify, *inter alia*, his or her name and the reason for the request, and must certify that the information will not be used for the purpose of telephone marketing or solicitation. S.C. Code Ann. § 56-3-510. The Department must retain all requests for motor vehicle record information for five years and must release a copy of all requests relating to a person upon that person's written request. S.C. Code Ann. § 56-3-520. The Department is authorized to charge a fee for releasing motor vehicle record information, and is required to promulgate certain procedural regulations relating to the release of motor vehicle record information, S.C. Code Ann. § 56-3-530, and to implement procedures to ensure that persons may "opt-out" and prohibit the use of motor vehicle record information about them for various commercial activities. S.C. Code Ann. § 56-3-540. The undisputed evidence submitted establishes that implementation of the DPPA would impose substantial costs and effort on the part of the Department in order for it to achieve compliance.

Condon v. Reno, 972 F. Supp. 977, 979-81 (D.S.C. 1997) (footnotes omitted) (all but first alteration in original).

In addition to challenging the constitutionality of the DPPA, the State sought a permanent injunction prohibiting enforcement of the DPPA. The United States

filed a motion to dismiss the suit based upon its contention that the DPPA was lawfully enacted pursuant to Congress's powers under both the Commerce Clause and Section 5 of the Fourteenth Amendment. In response, the State moved for summary judgment in its favor. After reviewing the parties' motions, the district court concluded that the DPPA was unconstitutional. Accordingly, the district court denied the United States' motion to dismiss, granted the State's motion for summary judgment, and permanently enjoined the enforcement of the DPPA in the State of South Carolina. This appeal followed.

II.

In this case, we must determine whether the DPPA violates the Tenth Amendment. Like all Acts of Congress, the DPPA is "presumed to be a constitutional exercise of legislative power until the contrary is clearly established." *Close v. Glenwood Cemetery*, 107 U.S. 466, 475, 2 S. Ct. 267, 27 L. Ed. 408 (1883); *see also I.N.S. v. Chadha*, 462 U.S. 919, 944, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983) ("We begin, of course, with the presumption that the challenged statute is valid."). Whether the contrary has been clearly established in this case, as the district court found, is a legal question subject to de novo review. *See Plyler v. Moore*, 129 F.3d 728, 734 (4th Cir. 1997).

The Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. When, however, Congress "is acting within the powers granted it under the Constitution, [it] may impose its will on the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991).

On appeal, the United States contends that the DPPA was lawfully enacted pursuant to Congress's powers under both the Commerce Clause and Section 5 of the Fourteenth Amendment. We address these arguments in turn.

A.

The United States first contends that the DPPA is constitutional because Congress enacted it pursuant to its power under the Commerce Clause. Congress, however, is constrained in the exercise of that power by the Tenth Amendment. Thus, the question before this Court is not whether the DPPA regulates commerce, but whether it is consistent with the system of dual sovereignty established by the Constitution.

1.

When Congress exercises its Commerce Clause power against the States, the resulting enactment is analyzed by the Supreme Court under one of two different lines of cases. *See New York v. United States*, 505 U.S. 144, 160-61, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (recognizing the two distinct lines of cases); *see also West v. Anne Arundel County, Md.*, 137 F.3d 752, 759-60 (4th Cir. 1998) (same). The first line of cases concerns the authority of Congress to regulate the States as States. *See, e.g., Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). Under this line of cases, Congress may enact laws of general applicability that incidentally apply to state governments. The second line of cases concerns the authority of Congress to direct the States to implement or administer a federal regulatory scheme. *See, e.g., Printz v. United States*, —— U.S. ——, 117 S. Ct. 2365, 138 L. Ed. 2d 914

(1997). Under this line of cases, Congress may not enact any law that would direct the functioning of the States' executives or legislatures. Not surprisingly, the United States contends that the instant case falls under the first line, while the State argues (and the district court found) that the case is controlled by the latter line of cases.

a.

The Supreme Court's jurisprudence with respect to the first line of cases has not been a model of consistency. In *Maryland v. Wirtz*, 392 U.S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968), the Supreme Court first held that Congress could subject state governments to generally applicable laws, such as the Fair Labor Standards Act. In *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), the Supreme Court overruled *Wirtz*. In particular, the Court held that the Commerce Clause did not give Congress the authority to regulate the "States as States." *Id.* at 845, 96 S. Ct. 2465 (holding that state employees are not subject to the Fair Labor Standards Act). In other words, Congress could "not exercise [Commerce Clause] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *Id.* at 855, 96 S. Ct. 2465.[2]

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[2] Without question, "the licensing of drivers constitutes an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." *United States v. Best*, 573 F.2d 1095, 1103 (9th Cir. 1978) (internal quotation marks omitted); *see also Peel v. Florida Dep't of Transp.*, 600 F.2d 1070, 1083 (5th Cir. 1979) ("Overseeing the transportation system of the state has traditionally been one of the functions of state government, and thus appears to be within the

The Supreme Court subsequently overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). In *Garcia*, the Supreme Court decided to leave to the political process the protection of the States against intrusive exercises of Congress's Commerce Clause powers.[3] *Id.* at 547-56, 105 S. Ct. 1005. Thus, under *Garcia* and its progeny, Congress may once again subject the States to legislation that is also applicable to private parties. *See id.* (upholding application of the FLSA to state and local governments because it was a generally applicable law); *EEOC v. Wyoming*, 460 U.S. 226, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (1983) (upholding application of the ADEA to state and local governments because it was a generally applicable law); *South Carolina v. Baker*, 485 U.S. 505, 108 S. Ct. 1355, 99 L. Ed. 2d 592 (1988) (upholding application of the Tax Equity and Fiscal Responsibility Act of 1982 to state and local govern-

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activities protected by the tenth amendment."). Thus, under the *National League of Cities* regime, the DPPA clearly would be unconstitutional.

[3] In his dissenting opinion, then Justice Rehnquist expressed his desire to eventually return to the rule outlined in *National League of Cities*. *See Garcia*, 469 U.S. at 580, 105 S. Ct. 1005 (stating that the principle outlined in *National League of Cities* "will, I am confident, in time again command the support of a majority of this Court"). Until that time, however, we remain bound by the Supreme Court's decision in *Garcia*. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989) (stating that "the Court of Appeals should . . . leav[e] to this Court the prerogative of overruling its own decisions"); *West v. Anne Arundel County, Md.*, 137 F.3d 752, 760 (4th Cir. 1998) (noting that "[l]ower federal courts have repeatedly been warned about the impropriety of preemptively overturning Supreme Court precedent").

ments because it was a generally applicable law); *see also Printz*, —— U.S. at ——, 117 S. Ct. at 2383 (noting that under *Garcia* "the incidental application to the States of a federal law of general applicability" was lawful); *New York*, 505 U.S. at 160, 112 S. Ct. 2408 (noting that under *Garcia* and its progeny, Congress may only "subject state governments to generally applicable laws").[4]

b.

In contrast, the Supreme Court's jurisprudence with respect to the second line of cases has been a model of consistency. In *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992), the Supreme Court reviewed a federal statute that, among other things, required the individual States either to enact legislation regulating low-level radioactive waste generated within their borders or to take title to the waste. As an initial matter, the Supreme Court noted that this was not a simple case of Congress attempting to regulate the States, which would fall under the *Garcia* line of cases. *See id.* at 160, 112 S. Ct. 2408. Rather, the Supreme Court framed the issue as con-

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[4] Of course, Congress may only subject the States to such legislation if it expresses with unmistakable clarity an intent to do so. *See Pennsylvania Dep't of Corrections v. Yeskey*, —— U.S. ——, ——, 118 S. Ct. 1952, 1954, 141 L. Ed. 2d 215 (1998) (finding that Congress plainly stated its intention to apply the ADA to State prisons and prisoners); *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) (finding that the ADEA did not apply to a state constitutional provision requiring judges to retire at age seventy; the Court will not interpret a federal statute in a manner that would interfere with essential state or local functions unless Congress plainly states its intention to do so in the statute itself). It is undisputed that Congress plainly stated its intention to subject the States to the DPPA.

cerning "the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way." *Id.* at 161, 112 S. Ct. 2408. In answering that question in the negative, the Supreme Court held that Congress could not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 176, 112 S. Ct. 2408 (internal quotation marks omitted).

In *Printz v. United States*, [521] U.S. [98], 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997), the Court reviewed an act of Congress, popularly referred to as the "Brady Bill," which regulated the sale of handguns. The Brady Bill, among other things, required state law enforcement officers "to participate, albeit only temporarily, in the administration of [the] federally enacted regulatory scheme." *Id.* at ——, 117 S. Ct. at 2369. As in *New York*, the Supreme Court found that the *Garcia* line of cases was inapplicable to the question before the Court. *See id.* at ——, 117 S. Ct. at 2383 (application of the *Garcia* line of cases is inappropriate "where, as here, it is the whole object of the law to direct the functioning of the state executive"). Instead, the Supreme Court framed the issue as the constitutionality of "the forced participation of the States' executive[s] in the actual administration of a federal program." *Id.* at ——, 117 S. Ct. at 2376. Noting that in *New York* it had held "that Congress cannot compel the States to enact or enforce a federal regulatory program," the Supreme Court in *Printz* held "that Congress cannot circumvent that prohibition by conscripting the State's officers directly." *Id.* at ——, 117 S. Ct. at 2384. The Court went on to note that

> [t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Id.

2.

On appeal, the United States relies primarily upon *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985), and its progeny, while the State relies principally upon *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992), and *Printz v. United States*, —— U.S. ——, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997). The district court rejected the United States' argument and analyzed the constitutionality of the DPPA under the *New York /Printz* line of cases. *See Condon v. Reno*, 972 F.Supp. 977, 985 (D.S.C. 1997); *see also Travis v. Reno*, 12 F. Supp.2d 921 (W.D. Wis. 1998) (finding the DPPA unconstitutional under *New York /Printz* line of cases); *Oklahoma v. United States*, 994 F. Supp. 1358, 1363 (W.D. Okla. 1997) (finding the DPPA unconstitutional under *New York/Printz* line of cases). *But see Pryor v. Reno*, 998 F. Supp. 1317, 1326-31 (M.D. Ala. 1998) (finding that the DPPA does not compel the

states to regulate and, therefore, is constitutional under *New York* and *Printz*).

We recognize, as the United States argues, that the DPPA is different in several respects from the statutes struck down in *New York* and *Printz*. Unlike the federal statute in *New York*, the DPPA does not commandeer the state legislative process. In particular, the DPPA does not require the States to enact legislation regulating the disclosure of personal information contained in their motor vehicle records. Instead, Congress enacted the regulations limiting the dissemination of information from those records. Moreover, unlike the federal statute in *Printz*, the DPPA does not conscript state officers to enforce the regulations established by Congress. Indeed, the DPPA does not require that state officials report or arrest violators of the DPPA. Instead, the DPPA is enforced through civil penalties imposed by the United States Attorney General against the States and permits criminal fines and civil causes of action against individuals.

Nevertheless, state officials must, as the district court found, administer the DPPA. *See Condon*, 972 F. Supp. at 985-86. The Supreme Court, in both *New York* and *Printz*, has made it perfectly clear that the Federal Government may not require State officials to administer a federal regulatory program. *See Printz*, —— U.S. at ——, 117 S. Ct. at 2384 (holding that "[t]he Federal Government may [not] issue directives requiring the States to . . . administer or enforce a federal regulatory program"); *New York*, 505 U.S. at 176, 112 S. Ct. 2408 (holding that the Federal Government cannot compel the States to administer "a federal regulatory program"). Indeed, allowing the Federal Government to do so would be plainly incompatible with our system

of "dual sovereignty." *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991); *see also Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S. Ct. 792, 107 L. Ed. 2d 887 (1990).

The United States attempts to sidestep this problem, however, by contending that the holdings in *Printz* and *New York* apply only when the law in question requires a State to regulate the behavior of its citizens. Rather than requiring a State to regulate its citizens, the United States contends that the DPPA requires a State to regulate its own behavior. Because the DPPA simply regulates a state activity, *i.e.*, the disclosure of personal information contained in state motor vehicle records, the United States contends that the instant case is controlled by the *National League of Cities/ Garcia* line of cases.

Even assuming that the United States' narrow reading of *Printz* and *New York* is correct, analyzing the constitutionality of the DPPA under the *Garcia* line of cases will not salvage the statute. Under *Garcia* and its progeny, Congress may only "subject state governments to generally applicable laws." *New York*, 505 U.S. at 160, 112 S. Ct. 2408 (explaining the difference between the two lines of cases); *see also Printz*, —— U.S. at ——, 117 S. Ct. at 2383 (noting that under *Garcia* "the incidental application to the States of a federal law of general applicability" was lawful). In other words, Congress may only subject the States to legislation that is also applicable to private parties. *See New York*, 505 U.S. at 160, 112 S. Ct. 2408 (noting that under *Garcia*, Congress may only "subject[] a State to the same legislation applicable to private parties").

In *Garcia*, the Supreme Court upheld application of the Fair Labor Standards Act (FLSA) to state and local

governments because the FLSA was generally applicable. Thus, Congress was *only* allowed to regulate how much the States pay their hourly employees because Congress also regulates how much private parties pay their hourly employees. *See Garcia*, 469 U.S. at 528, 105 S. Ct. 1005 (noting that the FLSA is generally applicable); *see also EEOC v. Wyoming*, 460 U.S. 226, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (1983) (same with the ADEA); *South Carolina v. Baker*, 485 U.S. 505, 108 S. Ct. 1355, 99 L. Ed. 2d 592 (1988) (same with the Tax Equity and Fiscal Responsibility Act of 1982).[5] Here,

[5] The dissent argues that the statutes at issue in *Garcia* and *Wyoming* were upheld because they did not use the States as implements of regulation, and not because they were generally applicable. *See post* at [31a-32a]. We disagree. In *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992), the Supreme Court cited both decisions as examples of cases dealing with "the authority of Congress to subject state governments to generally applicable laws." *Id.* at 160, 112 S. Ct. 2408. Indeed, the Court specifically stated that under the *Garcia* line of cases, Congress may only "subject[] a State to the same legislation applicable to private parties." *Id.* This understanding of *Garcia* and its progeny was recently reaffirmed in *Printz v. United States*, [521] U.S. [98], ——, 117 S. Ct. 2365, 2383, 138 L. Ed. 2d 914 (1997) (noting that the statutes at issue in *Garcia* and *Wyoming* were upheld because they were generally applicable). The dissent's complaint, therefore, is not with our characterization of the *Garcia* line of cases, but with the Supreme Court's. Cf. *New York*, 505 U.S. at 201, 112 S. Ct. 2408 (White, J., dissenting) (arguing that the statutes in *Garcia* and *Wyoming* were not upheld because they were generally applicable). Although the dissent may question the Supreme Court's analysis in *New York* and *Printz*, it is bound to follow it.

Finally, while conceding that the statutes at issue in *Garcia* and *Wyoming* were generally applicable, the dissent contends that the statute "at issue in *Baker* was not one of general applicability." *Post* at [31a] n.3. Again, we disagree. The tax statute in *South Carolina v. Baker* applied to any entity, whether it be a State or a private party, that issued bonds. *See* 485 U.S. at 510, 108 S. Ct. 1355 (noting that the statute "covers not only state bonds but also bonds issued by the United States and private corporations"). Thus, the law was one of general applicability. Indeed, the Supreme Court in both *New York* and *Printz* expressly distinguished the federal tax statute at issue in *Baker* from the statutes at issue in those cases on the ground that the statute in *Baker* was one of general applicability. *See Printz*, —— U.S. at ——, 117 S. Ct. at 2383; *New York*, 505 U.S. at 160, 112 S. Ct. 2408.

the DPPA does not attempt to regulate the disclosure of personal information contained in all public and private databases, which would incidentally apply to state motor vehicle records. Rather, the DPPA exclusively regulates the disclosure of information contained in state motor vehicle records. Of course, there is no private counterpart to a state Department of Motor Vehicles. Private parties simply do not issue drivers' licenses or prohibit the use of unregistered motor vehicles. Thus, rather than enacting a law of general applicability that incidentally applies to the States, Congress enacted a law that, for all intents and purposes, applies *only* to the States. *See Travis*, [12 F. Supp.2d at 929] ("To state the obvious, the [DPPA] is not a law of general applicability."); *Oklahoma v. United States*, 994 F. Supp. at 1362 (noting that a "cursory review of the [DPPA] indicates that it is directed at States"); *Condon*, 972 F. Supp. at 985-86 ("[I]nstead of bringing the States within the scope of an otherwise generally applicable law, Congress passed the DPPA specifically to regulate the States' control of their property.").

Although recognizing that the DPPA does not regulate private parties, the Government nevertheless argues that the DPPA is constitutional under the

Garcia line of cases. For instance, the United States contends that the DPPA is constitutional because it "subject[s] the States to the same type of regulation to which a private party *could* be subjected." Appellant's Br. at 20 (emphasis added). Not surprisingly, the United States failed to provide even a single authority to support this proposition. Under *Garcia*, a statute is constitutional only if it *is* generally applicable. A law is not generally applicable simply because it *could be* generally applicable. That Congress could subject private parties to the same type of regulation is irrelevant to the Tenth Amendment. Congress may invade the sovereignty of the States only when it actually enacts a law of general applicability. Nothing short of that will pass constitutional muster.

The United States also contends that the DPPA is constitutional under *Garcia* because Congress has already restricted private parties from disclosing personal information in several statutes. In particular, the United States cites the Video Privacy Protection Act, *see* 18 U.S.C.A. § 2710 (West Supp. 1998) (restricting disclosure of personal information contained in video rental records); the Cable Communications Policy Act, *see* 47 U.S.C.A. § 551 (West 1991 & Supp. 1998) (restricting disclosure of personal information about cable subscribers); and the Fair Credit Reporting Act, *see* 15 U.S.C.A. § 1618b (West 1998 & Supp. 1998) (restricting disclosure of credit reports). Although Congress has regulated the disclosure of personal information by some private parties, the Constitution permits Congress to regulate the conduct of *individuals*. In contrast, Congress may not, as a general matter, regulate the conduct of *the States*. *See New York*, 505 U.S. at 166, 112 S. Ct. 2408 ("[T]he Framers explicitly chose a

Constitution that confers upon Congress the power to regulate individuals, not States." (*quoted with approval in Printz*, —— U.S. at ——, 117 S. Ct. at 2377)). The one exception, of course, is that Congress may regulate the conduct of the States through laws of general applicability. Thus, that Congress has "regulate[d] the disclosure of information gathered by a variety of *private* entities," Appellant's Br. at 12 (emphasis added), does not mean that Congress may regulate the disclosure of information gathered by the States absent a generally applicable law.

During oral argument, the United States suggested, for the first time, that the DPPA is generally applicable when considered together with the aforementioned statutes regulating private parties. According to the United States, Congress may enact a statute regulating the States if it has already enacted a statute regulating the same conduct by private parties. Even if the general applicability of the DPPA could be determined in this manner, which we doubt, Congress has simply not enacted a statute regulating the same conduct by private parties. To be sure, Congress has regulated the disclosure of personal information gathered by video stores, cable providers, and credit bureaus. The regulation of these three entities, however, does not provide Congress with a basis for regulating the States. Indeed, we seriously doubt that the Supreme Court would have applied either the FLSA or the ADEA to the States had Congress applied those Acts only to video stores, cable providers, and credit bureaus. It bears repeating that Congress may regulate the conduct of the States *only* through laws of general applicability. At best, Congress has enacted several laws of limited applicability. Thus, even if the general appli-

cability of a statute could be determined in the manner urged upon us by the United States, Congress has not yet enacted a statute regulating the disclosure of personal information by all private parties.

Because the DPPA is not generally applicable, like the FLSA or ADEA, Congress did not have authority under our system of dual sovereignty to enact it.[6]

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[6] The dissent contends that the DPPA is constitutional because Congress could have "preempted the field of motor vehicle information disclosure." *Post* at [29a, 34a-35a]. We disagree. Only "where Congress has the authority to regulate *private* activity under the Commerce Clause . . . [may it] offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York v. United States*, 505 U.S. 144, 167, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (emphasis added) (citing *Hodel v. Virginia Surfacing Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288, 101 S. Ct. 2352, 69 L.Ed.2d 1 (1981)). Unlike the statutes at issue in the cases cited by the dissent, *see Hodel*, 452 U.S. at 288, 101 S. Ct. 2352 (preemption of state laws regulating surface mining); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 112 S. Ct. 2374, 120 L.Ed.2d 73 (1992) (preemption of state laws regulating occupational safety); *Department of Energy v. Ohio*, 503 U.S. 607, 112 S. Ct. 1627, 118 L. Ed. 2d 255 (1992) (preemption of state laws regulating water pollution); *FERC v. Mississippi* 456 U.S. 742, 102 S. Ct. 2126, 72 L. Ed. 2d 532 (preemption of state laws regulating electric and gas utilities), the DPPA, by its own terms, does not regulate private activity. Moreover, even assuming that Congress could have preempted the field of personal information disclosure, it did not do so here. Rather, Congress chose to regulate the States directly.

Similarly, the dissent contends that the DPPA is constitutional because "in exercise of its Commerce Clause powers, Congress could have, had it desired, made receipt of federal highway funds contingent on accepting [the] DPPA's provisions." *Post* at [29a]. As an initial matter, we note that Congress may attach conditions on the receipt of federal funds pursuant to its power under the Spending Clause, not the Commerce Clause. *See South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (holding that Congress has power under the Spending Clause to condition highway funds on States' adoption of minimum drinking age). With that having been said, we question whether Congress could have conditioned the States' receipt of federal highway funds on compliance with the DPPA. It is well established that the statute must bear at least some relationship to the purpose of the federal spending. *See id.* at 207-08 & n. 3, 107 S. Ct. 2793. We are hard pressed to see a connection between a privacy statute and highway funds. In any event, even if Congress could have conditioned the States' receipt of federal highway funds on compliance with the DPPA, it did not do so here. As such, that Congress *could* have done so is of absolutely no import. Indeed, the Supreme Court in *New York* and *Printz* held that the statutes at issue in those cases were unconstitutional even though it specifically recognized that both statutes could have been lawfully passed pursuant to Congress's Spending Clause power. *See Printz*, —— U.S. at ——, 117 S. Ct. at 2385 (O'Connor, J., concurring) (noting that Congress could have conditioned the States' receipt of federal funds on compliance with the statute); *New York*, 505 U.S. at 167, 112 S. Ct. 2408 (noting that Congress could have enacted the statute under its Spending Clause power).

Finally, the dissent argues that the DPPA is no different than the "National Voter Registration Act," which was upheld against a Tenth Amendment challenge in *Association of Community Organizations for Reform Now (ACORN) v. Edgar*, 56 F.3d 791 (7th Cir. 1995). *See post* at [37a]. Again, we disagree. The statute at issue in *ACORN*, popularly known as the "motor voter" law, was designed to make it easier to register to vote in federal elections. The Constitution, however, specifically grants Congress the power to regulate the time, place, and manner of congressional elections. *See* U.S. Const. art. I, § 4, cl. 1. Because the "manner" of holding elections includes the system for registering voters, *see Smiley v. Holm*, 285 U.S. 355, 366, 52 S. Ct. 397, 76 L. Ed. 795 (1932), the Seventh Circuit upheld the statute against a Tenth Amendment challenge, *see ACORN*, 56 F.3d at 793-94. We cannot find, and the dissent does not cite, a similar provision in the Constitution that specifically grants Congress the power to regulate the dissemination of personal information. As such, Congress's adoption of the

B.

The United States also contends that the DPPA was properly enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment. In light of the Supreme Court's landmark decision in *City of Boerne v. Flores*, —— U.S. ——, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), we are constrained to disagree.[7]

The Fourteenth Amendment provides, in pertinent part, as follows:

> Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, §§ 1, 5. Section 5 "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzen-*

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motor voter law tells us nothing about the constitutionality of the DPPA.

[7] Although the Supreme Court's ground breaking decision in *City of Boerne v. Flores*, —— U.S. ——, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), was decided in June of 1997, the United States did not cite the case in its opening brief, which was filed in January of 1998.

bach v. Morgan, 384 U.S. 641, 651, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966). In fact, "when *properly* exercising its power under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers." *EEOC v. Wyoming*, 460 U.S. at 243 n. 18, 103 S. Ct. 1054 (emphasis added) (citing *City of Rome v. United States*, 446 U.S. 156, 179, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980)). Congress's power to enact legislation under the Fourteenth Amendment is not unlimited, however. *See, e.g., City of Boerne v. Flores*, —— U.S. ——, ——, 117 S. Ct. 2157, 2171, 138 L. Ed. 2d 624 (1997) (holding that the Religious Freedom Restoration Act is "a considerable congressional intrusion into the States' traditional prerogatives," and that Congress exceeded its power under the Fourteenth Amendment in enacting the statute); *Gregory v. Ashcroft*, 501 U.S. 452, 469, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) (stating that "the Fourteenth Amendment does not override all principles of federalism"); *Oregon v. Mitchell*, 400 U.S. 112, 128, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970) (noting that "[a]s broad as the congressional enforcement power is, it is not unlimited"). For instance, Congress's power "extends only to *enforc[ing]* the provisions of the Fourteenth Amendment." *City of Boerne*, —— U.S. at ——, 117 S. Ct. at 2164 (emphasis added) (internal quotation marks omitted). Of perhaps equal importance, it is only a preventative or remedial power, not a substantive power. *See id.* at ——, 117 S. Ct. at 2167. As a result, Congress does not possess "the power to determine what constitutes a constitutional violation." *Id.* at ——, 117 S. Ct. at 2164.

Whether Congress properly exercised its power under Section 5 when it enacted the DPPA turns,

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therefore, on whether the Act enforces some right guaranteed by the Fourteenth Amendment. The United States contends "that automobile owners and operators have a reasonable expectation [of privacy in] their names, addresses, and phone numbers," Appellant's Br. at 24, and that the DPPA enforces that constitutional right.

As an initial matter, we note that "there is no general constitutional right to privacy." *Whalen v. Roe*, 429 U.S. 589, 608, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977) (Stewart, J., concurring) (internal quotation marks omitted). Rather, the Supreme Court has limited the "right to privacy" to matters of reproduction, *see Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942), contraception, *see Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), abortion, *see Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and marriage, *see Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978).

Of particular importance here, neither the Supreme Court nor this Court has ever found a constitutional right to privacy with respect to the type of information found in motor vehicle records.[8] Indeed, this is the very

[8] The United States cites three Fourth Circuit cases in which it claims a constitutional right to privacy was recognized. First, in *Taylor v. Best*, 746 F.2d 220 (4th Cir. 1984), this Court found that a prisoner did not have a constitutional right to keep his family history private. In *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990), this Court held that there was no constitutional right to privacy in information found in a public record. Finally, in *Watson v. Lowcountry Red Cross*, 974 F.2d 482, 487-88 (4th Cir. 1992), this Court, without attempting to define the parameters of a right to privacy, held that the disclosure of an anonymous blood donor's identity to the court and counsel would not violate the privacy

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sort of information to which individuals do not have a reasonable expectation of privacy. First, "pervasive schemes of regulation," like vehicle licensing, must "necessarily lead to reduced expectations of privacy." *California v. Carney*, 471 U.S. 386, 392, 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985); *cf. New York v. Class*, 475 U.S. 106, 113, 106 S. Ct. 960, 89 L. Ed. 2d 81 (1986) (noting that individuals have a diminished expectation of privacy in matters related to their automobiles).

Second, the same type of information is available from numerous other sources.[9] For example, the identical information can be obtained from public property tax records. As a result, an individual does not have a reasonable expectation that the information is confidential. *See Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (holding that an individual must have a reasonable expectation of confidentiality to have a constitutional right to privacy).

Third, as amici point out, there is a long history in the United States of treating motor vehicle records as

rights of the donor. None of these decisions supports the United States's arguments in this case. Indeed, in *United States v. Bales*, 813 F.2d 1289 (4th Cir. 1987), this Court held that the disclosure of an individual's social security number on a loan application did not violate the individual's constitutional right to privacy. *Id.* at 1297.

[9] If there is a constitutional right to privacy in such information, then the United States is violating the Constitution on an ongoing basis. For example, the United States operates a public database that contains the names, addresses, and medical data of every individual licensed to operate an airplane by the United States. *See* http://www.avweb.com/database/airmen. A related database permits anyone to obtain the name and address of the owner of an airplane simply by providing the number displayed on the airplane's tail. *See* http://www.avweb.com/database/ aircraft.

public records. *See* Brief of Amici Curiae at 5-20.[10] In fact, in *United States Dept. of Health & Human Services v. FLRA*, 833 F.2d 1129 (4th Cir. 1987), this Court observed that an individual's name and home address "is a matter of public record in motor vehicle registration and licensing records." *Id.* at 1135 n. 8.

Finally, such information is commonly provided to private parties. For instance, a State-issued driver's license is often needed to cash a check, use a credit card, board an airplane, or purchase alcohol. We seriously doubt that an individual has a constitutional right to privacy in information routinely shared with strangers.

In sum, the information found in motor vehicle records is not the sort of information to which individuals have a reasonable expectation of privacy. As such, there is no constitutional right to privacy in the information contained in motor vehicle records. Accordingly, Congress did not have the authority under Section 5 of the Fourteenth Amendment to enact the DPPA.

III.

For the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.

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[10] In addition to the briefing we received from the parties, we accepted an amici curiae brief from the States of Alabama, Idaho, and Oklahoma, and the Better Government Bureau, Inc. We thank the amici for their participation.

PHILLIPS, Senior Circuit Judge, dissenting:

Adopted in 1994 as part of larger omnibus crime legislation, the Driver's Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721-25, is a unique federal enactment designed to address the privacy and safety concerns flowing from the unfettered disclosure of personal information contained in drivers' license files maintained by state motor vehicle departments. Pigeonholing the Act into one of two narrow legal constructs that it apparently believes exclusively define the Tenth Amendment's constraints on federal power, the majority concludes that the Act is unconstitutional because it impermissibly regulates States as States and because it is not a law of general applicability to both State and private actors. I dissent, believing that the unique structure and internal operation of the DPPA, considered in light of the harm generated by the States' own actions at which it is aimed, distinguish this case from those upon which the majority relies and compels the conclusion that the Act is consistent with both substantive and structural limitations on the exercise of federal power.[1]

The DPPA makes it unlawful for a department of motor vehicles to "knowingly disclose or otherwise make available to any person or entity personal information . . . in . . . a motor vehicle record." § 2721(a). Exceptions, most of which relate to law enforcement

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[1] Because I believe the DPPA satisfies structural limitations on Congress's exercise of its Commerce Clause power, I do not address the separate question whether other sources of federal power, including Section 5 of the Fourteenth Amendment, are subject to the same structural limitations and if not whether the Government may properly rely on those sources (whatever they may be) here.

and other proper investigative purposes, are enumerated in the Act. *See* § 2721(b). States not wishing to limit themselves to the Act's enumerated exceptions may opt out by affording licensees the opportunity to prohibit disclosure of their personal information. If such an option is provided and license holders do not object, the State may release the information for any purpose. *See* § 2721(b)(11).

State violations of the Act trigger civil penalties. Specifically, § 2723(b) subjects "[a]ny State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter" to "a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance." Although the Act authorizes a private civil action for damages, States and their agencies may not be sued. *See* § 2724(a) (authorizing a civil action against any "person" who violates the Act); § 2725(2) (defining person to include "an individual, organization, or entity, but . . . not . . . a State or agency thereof"). The Act also prohibits individuals from receiving information for purposes not outlined in the Act or for otherwise receiving such information under false pretenses. *See* § 2723(a). Such acts are prohibited by federal—not state—law, and no State is required to outlaw or punish individuals who improperly receive information or otherwise violate the Act.

Because the DPPA regulates the flow of personal information—information that is consistently in the stream of commerce and for which States receive substantial reimbursement—the only issue in this case is whether Congress may, consistent with the Tenth Amendment, impose its will on States respecting con-

duct uniquely engaged in by States and state actors.[2] It follows that, in exercise of its Commerce Clause powers, Congress could have, had it desired, made receipt of federal highway funds contingent on accepting DPPA's provisions. *See South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (allowing the Secretary of Transportation to withhold federal highway money from States refusing to raise the legal drinking age). Similarly, Congress could almost assuredly have completely preempted the field of motor vehicle information disclosure, a drastic move that States would undoubtedly resist but on which, in an analogous setting, the Court has placed its seal of approval. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981) (upholding Congress's imposition of a choice between state regulation pursuant to federal guidelines and complete preemption of surface mining). Instead, Congress chose to regulate the States directly, without offering the "incentive" of public funds or threatening to preempt the field.

The majority concedes, as it must, that the end object of the Act is the direct regulation of state conduct. It is not the indirect regulation of private conduct—here information use—by forcing the states directly to regulate that conduct, in the way that the states were

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[2] The district court did not address whether Congress acted within its Commerce Clause power in enacting the DPPA and, as indicated, I assume the point. South Carolina casually asserts on appeal that Congress lacked this power, apparently because there was not a sufficient impact on interstate commerce. The only court to consider this issue directly easily found sufficient evidence of a "nationwide trade of DMV records" to sustain Congress's exercise of its Commerce Clause power. *Pryor v. Reno*, 998 F. Supp. 1317, 1326 (M.D.Ala.1998).

held impermissibly compelled to regulate the waste-handling conduct of private parties in *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). Nor does the Act make South Carolina an executive instrument of the federal government in the way the Brady Act was held impermissibly to have conscripted local law enforcement officials to enforce federal law in *Printz v. United States*, — U.S. ——, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997).

It is the direct regulation of the State activity here which distinguishes the DPPA, in the most fundamental of ways, from the federal legislation struck down respectively in *New York* and *Printz*.

Unlike the *New York* legislation, the DPPA does not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a *federal* regulatory program." *New York*, 505 U.S. at 176, 112 S. Ct. 2408 (quoting *Hodel*, 452 U.S. at 288, 101 S. Ct. 2352) (emphasis added). It is true that states that choose to disclose motor vehicle information must take steps to administer their programs in conformity with federal guidelines. But that administration will be of their own choosing and will not in any way be a "federal regulatory program." And it is settled that not every kind of federally forced state administration to comply with federal law violates the Tenth Amendment. In *South Carolina v. Baker*, 485 U.S. 505, 108 S. Ct. 1355, 99 L. Ed. 2d 592 (1988), the Court upheld a federally imposed requirement that public bonds issue only in registered form. Although the Tax Equity and Fiscal Responsibility Act of 1982 required States to abandon their previous bearer systems and install completely different administrative programs, the *Baker* Court dismissed South Carolina's argument that this burden

unconstitutionally coerced state officials. The undoubted burden was, explained the Court, simply "an inevitable consequence of regulating a state activity." *Id.* at 514, 108 S.Ct. 1355. The Court went on to say:

> That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

Id. at 515, 108 S. Ct. 1355.

The majority here seeks to avoid *Baker*'s force by characterizing it as a case involving a law of general applicability. In the majority's view, only if the DPPA is also a law of general applicability in the way that the FLSA was considered to be in *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985), the ADEA to be in *EEOC v. Wyoming*, 460 U.S. 226, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (1983), and the Tax Equity Act arguably to be in *Baker*, can it be upheld against Tenth Amendment challenge, and it is not such a law. I disagree with the majority's premise that only laws of such general applicability may be so upheld.

It is true that the laws upheld in *Garcia* and *Wyoming* were laws of general applicability in the sense that they imposed duties equally on state and private actors.[3] And it is true that the Court has

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[3] Actually, the tax provision at issue in *Baker* was not one of general applicability comparable to the "generality" of the FLSA or ADEA. The relevant Act was omnibus tax legislation dedicated to a broad range of tax issues, only one of which was the requirement that bonds issue in registered form. And the only specific provision at issue in *Baker* was one, § 310(b)(1), that removed tax

thought that the states could find adequate protection against this sort of across-the-board federal regulation in the electoral protections afforded by the federal system. *See Printz*, —— U.S. at ——, 117 S. Ct. at 2381 (adequate to preserve the proper balance between state and federal "sphere[s] of authority"). But, the majority fails to explain the theoretical basis or constitutional theory upon which this distinction rests or applies here. Admittedly, when Congress imposes generally applicable obligations upon a State the State is at least partially acting as a market participant and at least in part for this reason must follow federal law in areas of federal concern. But the principal cases noting this feature of the challenged legislation never have intimated that only by such generally applicable legislation may Congress, consistent with the structural limitations of federalism, impose obligations on the states.

I believe that the legislation at issue in *Garcia* and *Wyoming* (and possibly in *Baker*) was immune to Tenth Amendment challenge not so much—if at all—because they applied equally to state and private actors as because they directly regulated state activities rather than using the "States as implements of regulation" of third parties. *New York*, 505 U.S. at 160, 112 S. Ct.

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exemptions only for publicly offered long-term bonds. It therefore imposed a burden only on state and local governments, that is to say only on those groups that issued "public" bonds.

In fact, many of the specific provisions applicable to states under the FLSA have unique application only to government actors. In *West v. Anne Arundel County*, 137 F.3d 752 (4th Cir. 1998), for example, we rejected a Tenth Amendment challenge to a firefighter and law enforcement exception to the overtime provisions of the FLSA, even though "the relevant provisions of the 1974 Amendments targeted only state governmental entities." *Id.* at 758.

2408. *See* Thomas H. Odom, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U. Pa. L. Rev. 1657, 1662 (1987) (explaining that *Garcia* "applies only to federal statutes that directly regulate the states"). This, I believe is what most critically distinguishes the legislation upheld in *Garcia*, *Wyoming* and *Baker* from those few examples of invalidated legislation in which Congress took the unusual step of compelling States to invoke their legislative process (*see New York*) or conscripted their executive officials (*see Printz*) in an effort to regulate or circumscribe by indirection the action of third parties. In those cases, the Court confronted a unique question: "[t]hat is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way." *New York*, 505 U.S. at 160, 112 S. Ct. 2408. That question is not presented by the DPPA. *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv. L. Rev. 2180, 2205 (describing the DPPA as a federal statute that does not "'commandeer' in the sense of requiring state regulation of nongovernmental actors").

The DPPA does not require that states prohibit private individuals from obtaining information in violation of its provisions. Section 2723(a) prohibits this directly by making violation of the DPPA a federal offense. In fact, the DPPA does not require that states act at all. Its provisions only apply once a State makes the voluntary choice to enter the interstate market created by the release of personal information in its files. As did the compelled adoption by the states of a registered bond system, the DPPA only "regulates state activities: it does not . . . seek to control or influence the manner in which States regulate private parties." *Baker*, 485

U.S. at 514, 108 S. Ct. 1355. For this reason, *New York* and *Printz* do not require invalidating this Act.

Nor do I believe that any other constitutionally-based federalism principle, perhaps underlying *Printz* and *New York* at a deeper level, requires its invalidation. This congressional enactment requires only that states choosing to regulate the release of particular information in their possession into the stream of interstate commerce do so in a way Congress deems appropriate. Elected federal officials have made a considered policy determination that unfettered release of this information is not in the public interest because of privacy concerns and because it would be injurious to the interstate market in information. Whether Congress is right or not in that determination is irrelevant. It is sufficient for our purposes that Congress deems injurious a specific state activity in which by definition private actors do not engage. To assume that Congress could only regulate the states' conduct directly if it also equally regulated comparable private conduct (even where none in fact exists) seems to me to bear no relationship to any concept of federalism implicit in the Tenth Amendment as interpreted by the Supreme Court.

In *New York*, the Court explained why the peculiar practices it confronted there offended core notions of state sovereignty while other, perhaps more coercive, action such as field preemption did not:

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share

> their view. That view can always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.

New York, 505 U.S. at 168, 112 S. Ct. 2408. It is this concern for political accountability that drives the Court's decision in *New York* and provides the theoretical basis and legal authority for invalidating a federal statute that otherwise was within Congress's power to enact. But political accountability is not a concern with the DPPA because with it Congress is doing the regulating and Congress will pay any political price for any resulting electoral disaffection.

Finally, the majority's suggestion that Congress lacks authority to regulate "States as States"—a reference presumably to the now abandoned multifaceted inquiry adopted by the Court in *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976)—simply has no current force.[4] Pursuant

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[4] In *Hodel*, 452 U.S. at 286, 101 S. Ct. 2352, the Court explained the since rejected theory of *National League of Cities* by quoting language from that decision that closely resembles the majority's understanding of current Tenth Amendment jurisprudence as I read its opinion.

> [W]hen Congress attempts to directly regulate the States as States the Tenth Amendment requires recognition that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."

to Art. VI, cl. 2, the federal government is supreme within its domain. So long as it acts within the substantive constraints imposed by the Constitution, it may direct or forbid the states to do any number of things by either fully or partially exercising its fundamental power of preemption. *See, e.g., Gade v. National Solid Wastes Management Ass'n.*, 505 U.S. 88, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) (sustaining the power of the federal government to limit state attempts to regulate in the field of occupational safety); *Department of Energy v. Ohio*, 503 U.S. 607, 611-12, 112 S. Ct. 1627, 118 L. Ed. 2d 255 (1992) (sustaining the Clean Water Act's regulation and limitation of state authority to control the release of pollutants into waterways); *Federal Energy Regulatory Commission (FERC) v. Mississippi*, 456 U.S. 742, 759-67, 102 S. Ct. 2126, 72 L. Ed. 2d 532 (1982) (affirming the power of the federal government to regulate directly state-run electric and gas utilities).

By regulating directly the actions of states that choose to enter the personal information market, Congress is doing no more than exercising this power of preemption. The DPPA does nothing different from, for example, that done by federal regulation of municipal sewage and state-owned solid waste disposal systems. *See* Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 Vand. L. Rev. 1137, 1156-57 & 1202-03 (1997) (distinguishing direct federal regulation of States from federally imposed requirements that States regulate third parties). Nor is the DPPA's regulation different in critical respects from federal regulation of any number of other state

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Id. at 286-87, 96 S. Ct. 2465 (quoting *National League of Cities*, 426 U.S. at 845, 96 S. Ct. 2465).

activities in areas subject, if Congress chose, to full preemption. One need look no further for an example than to Congress's adoption of the National Voter Registration Act (NVRA) and the subsequent rejection of Tenth Amendment challenges to its provisions. *See ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995) (sustaining direct regulation of state voter registration practices under the NVRA); *accord Wilson v. United States*, 878 F. Supp. 1324 (N.D. Cal. 1995). Other examples that come readily to mind might include direct federal regulation of state-owned liquor monopolies or lottery facilities. Surely it is no basis for invalidating such regulations that no private equivalent could be found in the particular area of regulation. Would the requirements of the DPPA really be any less intrusive on state sovereignty interests if they were part of broad privacy protections involving private as well as public holders of sensitive information? *See, e.g.*, Cable Communications Privacy Act, 47 U.S.C. § 551; Electronics Communications Privacy Act, 18 U.S.C. § 2702; Fair Credit Reporting Act, 15 U.S.C. § 1681b; Video Privacy Protection Act, 18 U.S.C. § 2710. I do not see how, hence I do not see how the DPPA's lack of general applicability requires its invalidation.

I would reverse the judgment holding the DPPA unconstitutional as a violation of the Tenth Amendment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C.A. No. 3:98-3476-19

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA; STATE OF SOUTH CAROLINA, PLAINTIFFS

AND

SOUTH CAROLINA PRESS ASSOCIATION; VIRGINIA PRESS ASSOCIATION; NORTH CAROLINA PRESS ASSOCIATION; WEST VIRGINIA PRESS ASSOCIATION; MARYLAND/DELAWARE/DISTRICT OF COLUMBIA PRESS ASSOCIATION; NEWSPAPER ASSOCIATION OF AMERICA; AND AMERICAN SOCIETY OF NEWSPAPER EDITORS, INTERVENORS

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; AND UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Sept. 11, 1997
As Amended: Sept. 16, 1997]

ORDER

SHEDD, District Judge.

In this case of first impression the State of South Carolina and its Attorney General ("the State") chal-

lenge the constitutionality of the "Driver's Privacy Protection Act of 1994" ("the DPPA"), 18 U.S.C. §§ 2721-25, which regulates the dissemination and use of certain information contained in State motor vehicle records, on the grounds that it violates the Tenth and Eleventh Amendments to the United States Constitution.[1] The State seeks a permanent injunction prohibiting enforcement of the DPPA. The United States of America and its Attorney General ("the United States") have filed a motion to dismiss based on their contention that (1) the Court lacks jurisdiction over these claims because of the justiciability concepts of ripeness and standing and, alternatively, (2) these claims fail on their merits because the DPPA was lawfully enacted pursuant to Congress' powers under both the Commerce Clause and § 5 of the Fourteenth Amendment. In turn, the State has moved for summary judgment in its favor.[2] After carefully reviewing this matter, the Court concludes that the DPPA is unconstitutional. Accordingly, the Court will deny the United States' motion to dismiss, grant the State's motion for summary judgment,

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[1] To date, no court appears to have addressed the constitutionality of the DPPA, *cf. Loving v. Reno*, C.A. No. 96-141 (W.D. Okla. Jan. 21, 1997) (dismissing without prejudice First Amendment challenge on grounds of ripeness), and only one other State has challenged the DPPA on constitutional grounds. *See Oklahoma v. United States*, C.A. No. 97-1423R (W.D. Okla. filed Sept. 3, 1997).

[2] At oral argument, both the United States and the State agreed that absent a justiciability problem, a summary judgment ruling (in favor of either party) would be appropriate based on the record presented.

and permanently enjoin the enforcement of the DPPA in the State of South Carolina.[3]

I

Congress enacted the DPPA in 1994 in an effort to remedy what it perceived to be a problem of national concern: *i.e.*, the active commerce in, and consequent easy availability of, personal information contained in State motor vehicle records. Testimony before Congress established that as many as 34 States allowed easy access to personal information contained in motor vehicle records and that criminals had used such information to locate victims and commit crimes.[4] Congress also found that many States sell or otherwise permit

[3] In addition to the State's claims, various media associations, acting as intervenors ("Intervenors"), challenge the DPPA's contitutionality under the First Amendment. The Court's determination under the Tenth Amendment renders it unnecessary to rule on either the State's Eleventh Amendment challenge or Intervenors' First Amendment challenge. *See, e.g., Clinton v. Jones*, — U.S. ——, —— n. 11, 117 S .Ct. 1636, 1642 n. 11, 137 L. Ed. 2d 945 (1997) ("'It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case'") (citation omitted); *Mobil Oil Corp. v. Virginia Gas. Mkt's. & Auto. Repair Assn.*, 34 F.3d 220, 227 (4th Cir. 1994), *cert. denied*, 513 U.S. 1148, 115 S. Ct. 1097, 130 L. Ed. 2d 1065 (1995) ("It is well established that courts should refrain from addressing constitutional questions unless it is necessary to do so"). The Court will dismiss those claims on grounds of mootness.

[4] Perhaps the most publicized incident of this type involved the stalking and eventual murder of actress Rebecca Schaeffer. The Court notes that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government," *Patterson v. New York*, 432 U.S. 197, 201, 97 S. Ct. 2319, 2322, 53 L. Ed. 2d 281 (1977), and South Carolina has enacted anti-stalking legislation. *See* S.C. Code Ann. §§ 16-3-1700 to -1840.

the use of information contained in motor vehicle records for direct marketing purposes.

The DPPA, which is scheduled to become effective on September 13, 1997, generally prohibits "a State department of motor vehicles, and any officer, employee, or contractor, thereof, [from] knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. § 2721(a).[5] The DPPA specifies a list of exceptions when personal information contained in a State motor vehicle record may be obtained and used. *See* 18 U.S.C. § 2721(b).[6] Additionally, the DPPA permits State motor vehicle departments to:

[5] For purposes of the DPPA "personal information" is defined as "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status," 18 U.S.C. § 2725(3), and a "motor vehicle record" is defined as "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." 18 U.S.C. § 2725(1).

[6] The DPPA permits disclosure of personal information from State motor vehicle records to carry out the purposes of various federal statutes; for official use by government agencies; for use in connection with motor-vehicle related matters such as theft and safety; for certain business uses; for use in connection with judicial, agency, or self-regulatory body proceedings; for certain research uses; for use by insurers in connection with claims investigations, anti-fraud activities, rating, and underwriting; for use in identifying owners of towed and impounded vehicles; for certain private investigative or security uses; for use by employers to verify information relating to a holder of commercial driver's license; for

> [E]stablish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in [§ 2721(b)], may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under [§ 2721].

18 U.S.C. § 2721(d).[7] The DPPA also prohibits "any person [from] knowingly . . . obtain[ing] or disclos[ing] personal information, from a motor vehicle record, for any use not permitted under section 2721(b)," 18 U.S.C. § 2722(a), and from "mak[ing] false representation to obtain any personal information from an individual's motor vehicle record." 18 U.S.C. § 2722(b).

The DPPA provides that "[a]ny State department of motor vehicles that has a policy or practice of substantial noncompliance . . . shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance." 18 U.S.C. § 2723(b). The DPPA also creates a criminal fine, 18 U.S.C. § 2723(a), and a civil cause of

use in connection with private tollways; for use by any requester who has the written consent of the person whose information is sought; and for any state-authorized purpose relating to the operation of a motor vehicle or public safety. The DPPA also permits disclosure for any other use, or for bulk distribution commercial use, if the motor vehicle department provides individuals an opportunity to prohibit such disclosure.

[7] Section 2721(c) governs the resale or redistribution of information lawfully obtained under § 2721(b).

action against a "person"[8] who knowingly violates it. 18 U.S.C. § 2724(a).[9]

South Carolina currently has its own statutory provisions regarding the disclosure and use of its motor vehicle records, and South Carolina's scheme differs significantly from the DPPA. *See* S.C. Code Ann. §§ 56-3-510 to -540. Under South Carolina law a person who requests information contained in South Carolina's motor vehicle records must submit the request on a form provided by the State Department of Public Safety ("the Department")[10] and must specify, *inter alia*, his or her name and the reason for the request, and must certify that the information will not be used for the purpose of telephone marketing or solicitation. S.C. Code Ann. § 56-3-510. The Department must retain all requests for motor vehicle record information for five years and must release a copy of all requests relating to a person upon that person's written request. S.C. Code Ann. § 56-3-520. The Department is authorized to charge a fee for releasing motor vehicle record information, and is required to promulgate certain procedural regulations relating to the release of motor vehicle record information, S.C. Code Ann. § 56-3-530, and to implement procedures to ensure that persons

[8] A "person" under the DPPA is "an individual, organization or entity, but does not include a State or agency thereof." 18 U.S.C. § 2725(2).

[9] The potential remedies include actual and punitive damages, reasonable attorneys' fees and litigation costs, and other preliminary and equitable relief as determined by the court. 18 U.S.C. § 2724(b).

[10] The Department, through its Motor Vehicle Division, is responsible for the maintenance of South Carolina's motor vehicle records. *See* S.C. Code Ann. §§ 23-6-20, -30, and -300.

may "opt-out" and prohibit the use of motor vehicle record information about them for various commercial activities. S.C. Code Ann. § 56-3-540. The undisputed evidence submitted[11] establishes that implementation of the DPPA would impose substantial costs and effort on the part of the Department in order for it to achieve compliance.[12]

II

"Judging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that [a federal court] is called upon to perform.'" *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319, 105 S. Ct. 3180, 3188, 87 L. Ed. 2d 220 (1985) (citations and internal quotation marks omitted). The DPPA, like all Acts of Congress, "is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established," *Close v. Glenwood Cemetery*, 107 U.S. 466, 475, 2 S. Ct. 267, 274, 27 L. Ed. 408 (1883); *see also I.N.S. v. Chadha*, 462 U.S. 919, 944, 103 S. Ct. 2764, 2780-81, 77 L. Ed. 2d 317 (1983) ("We begin, of course, with the presumption that the challenged statute is valid"), and whether the Court considers the DPPA to be a wise law is immaterial to the matter at hand. *See id.* at 944, 103 S. Ct. at 2780-81 (challenged law's "wisdom is not the concern of the courts"). The Court's function is thus limited:

> It is sometimes said that the court assumes a power to overrule or control the action of the people's rep-

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[11] This evidence is contained in the unrebutted affidavit of J. Glenn Beckham, Deputy Director for the Division of Motor Vehicles of the Department.

[12] The Court finds that the State has standing to pursue its claims and that they are ripe.

> resentatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. [The] court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

United States v. Butler, 297 U.S. 1, 62-63, 56 S. Ct. 312, 318, 80 L. Ed. 477 (1936).[13]

A.

The United States first contends that the DPPA is constitutional because Congress enacted it pursuant to

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[13] When "it is acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 2400, 115 L. Ed. 2d 410 (1991). However, because it "settled that the Constitution . . . is the only source of power authorizing action by any branch of the Federal Government," *Dorr v. United States*, 195 U.S. 138, 140, 24 S. Ct. 808, 809, 49 L. Ed. 128 (1904), Congress, like the other two branches, "possess[es] no power not derived from the Constitution." *Ex parte Quirin*, 317 U.S. 1, 25, 63 S. Ct. 2, 10, 87 L. Ed. 3 (1942).

its power to regulate interstate commerce under the Commerce Clause.[14] The State, while not conceding that there is a sufficient commerce nexus present with respect to State motor vehicle records,[15] nonetheless argues that Congress exceeded its constitutional power and infringed on the sovereignty of the States in enacting the DPPA, thereby violating the Tenth Amendment,[16] because Congress has directed the States to enforce the federal policy embodied in the DPPA by regulating their motor vehicle records. The State relies principally upon two opinions of the Supreme Court—*New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992), and *Printz v. United States*, —— U.S. ——, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997)—both of which struck down congressional legislation. Although the United States maintains that these cases are inapplicable, the Court finds them to be controlling with respect to this issue.[17]

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[14] U.S. Const., Art. I, § 8, cl. 3.

[15] The State asserts in footnote 4 (page 10) of its February 21, 1997, memorandum: "It is doubtful in any event whether [the DPPA] is a valid exercise of the power to regulate commerce. Like the flawed statute in *Lopez v. U.S.* [sic], 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), it seeks to regulate potential criminal conduct through an attenuated link to interstate commerce."

[16] The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[17] As the Supreme Court noted in *New York*, the question presented—*i.e.*, "whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States"—can be viewed in either of two ways:

> In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in . . . the Constitution. In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. In a case like [this one], involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

505 U.S. at 155-56, 112 S. Ct. at 2417.

(1)

In *New York*, the State of New York and two of its counties ("New York") challenged, on Tenth Amendment grounds, federal legislation which required, *inter alia*, the States under certain conditions to take title to low-level radioactive waste generated within their borders. While recognizing that Congress possessed the power under the Commerce Clause to regulate the interstate market in waste disposal, New York argued that the Tenth Amendment limited Congress' power to regulate in this manner because "[r]ather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste, . . . Congress . . . impermissibly directed the States to regulate in this field." 505 U.S. at 160, 112 S. Ct. at 2420. The Supreme Court thus framed the issue in the case as concerning "the circumstances under which Congress may use the States as Implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way." *Id.* at 161, 112 S. Ct. at 2420.

It is unnecessary to restate in detail the historical and constitutional analysis employed by the Supreme

Court. It suffices to say that the Supreme Court's analysis of its prior precedent led it to conclude that "[w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 162, 112 S. Ct. at 2421. Looking further to historical information concerning the drafting of the Constitution, the Supreme Court then stated that it has

> [A]lways understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

Id. at 166, 112 S.Ct. at 2423.[18]

Turning to the merits of the take title provision, the Supreme Court concluded:

> The take title provision offers state governments a "choice" of either accepting ownership of waste or regulating according to the instructions of Congress. Respondents do not claim that the Constitution

[18] The Supreme Court noted that Congress does, however, have the ability to "encourage a State to regulate in a particular way, or . . . [to] hold out incentives to the States as a method of influencing a State's policy choices." 505 U.S. at 166, 112 S. Ct. at 2423. Congress did not exercise these options in enacting the DPPA.

> would authorize Congress to impose either option as a freestanding requirement. On one hand[,] the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments. On the other hand, the second alternative held out to state governments—regulating pursuant to Congress' direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.
>
> *Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. . . . Either way, "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regula-*

> *tory program," an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.*

Id. at 175-76, 112 S. Ct. at 2428 (emphasis added and citation omitted). Importantly, the Supreme Court rejected, *inter alia*, the United States' contention, which is reasserted here (*see infra*) that precedent such as *EEOC v. Wyoming*, 460 U.S. 226, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (1983), *South Carolina v. Baker*, 485 U.S. 505, 108 S. Ct. 1355, 99 L. Ed. 2d 592 (1988), and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L. Ed. 2d 1016 (1985) ("the *Garcia* line of cases")—which concerned Congress' authority to subject state governments to generally applicable laws—altered the Tenth Amendment analysis:

> [W]hether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable *federal* regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact state regulation. *No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to preempt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.*

505 U.S. at 178, 112 S. Ct. at 2429 (emphasis in original and added).

(2)

Printz presented the Supreme Court with another opportunity to consider Congress' power relative to the States. *Printz* was an action brought by two county sheriffs to challenge the constitutionality of a portion of the "Brady Act" which required the "chief law enforcement officer" ("CLEO") of certain localities "to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme." —— U.S. at ——, 117 S. Ct. at 2369. As the Supreme Court summarized:

> Regulated firearms dealers are required to forward Brady Forms not to a federal officer or employee, but to the CLEOs, whose obligation to accept those forms is implicit in the duty imposed upon them to make "reasonable efforts" within five days to determine whether the sales reflected in the forms are lawful. While the CLEOs are subjected to no federal requirement that they prevent the sales determined to be unlawful (it is perhaps assumed that their state-law duties will require prevention or apprehension), they are empowered to grant, in effect, waivers of the federally prescribed 5-day waiting period for handgun purchases by notifying the gun dealers that they have no reason to believe the transactions would be illegal.

Id. The Supreme Court framed the issue of the case as being the constitutionality *vel non* of "the forced participation of the States' executive in the actual administration of a federal program." *Id.* at ——, 117 S. Ct. at 2376.

It is again unnecessary to restate all of the analysis employed by the Supreme Court. Rather, it is suffi-

cient to note that the Supreme Court read its precedent as clearly establishing that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Id.* at ——, 117 S. Ct. at 2380. Moreover, the Supreme Court again rejected the United States' reliance on the *Garcia* line of cases finding those cases to be "inappropriate" "where, as here, it is the whole object of the law to direct the functioning of the state executive . . . ." *Id.* at ——, 117 S. Ct. at 2383 (emphasis in original). The Supreme Court's holding is clear, specific, and powerful:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Id. at ——, 117 S. Ct. at 2384.

(3)

The State asserts, and the Court agrees, that the DPPA falls within the prohibition of *New York* and *Printz*. Unquestionably, the States have been, and remain, the sovereigns responsible for maintaining motor vehicle records, and these records constitute

property of the States which they lawfully (and necessarily) maintain. *See United States v. Best*, 573 F.2d 1095, 1103 (9th Cir. 1978) (citation omitted) ("there is little question that the licensing of drivers constitutes 'an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens'"); *Peel v. Florida Dept. of Transp.*, 600 F.2d 1070, 1083 (5th Cir. 1979) ("Overseeing the transportation system of the state has traditionally been one of the functions of state government, and thus appears to be within the activities protected by the tenth amendment"). In enacting the DPPA, Congress has chosen not to assume responsibility directly for the dissemination and use of these motor vehicle records. Instead, Congress has commanded the States to implement federal policy by requiring them to regulate the dissemination and use of these records. In order to comply with Congress' directive, the States are forced by the threat of administrative penalty (and indirectly by civil and criminal sanction) to take measures to prohibit access by their citizens to the motor vehicle records. This command clearly runs afoul of the holdings of *New York* and *Printz*.

The United States argues that the DPPA is not affected by *New York* and *Printz* because it does not compel the States to "regulate" within the meaning of those cases. The United States reads those cases as stating the proposition that a federal law is prohibited in this instance only if it requires the States to regulate the behavior of their citizens:

> Plaintiffs are correct that Congress cannot "require the States to regulate." *New York*, 505 U.S. at 178 [112 S. Ct. at 2429]. Although Congress may regulate individuals' behavior directly, it cannot tell

> States to regulate individuals' behavior for it. *See New York*, 505 U.S. at 166 [112 S. Ct. at 2423]. "[T]he Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166 [112 S. Ct. at 2423]. . . .
>
> The DPPA does not compel States to require or prohibit any acts of their citizens. Nowhere does it order States to regulate how their citizens use, sell, or otherwise redisclose personal information they receive from State department of motor vehicle archives. To the contrary, the DPPA directly regulates individuals' use of that information.

Memorandum In Support Of Motion To Dismiss (Jan. 17, 1997), at 15. This argument misses the mark on at least two points.

First, the United States' reading of *New York* and *Printz* is much too narrow. This fact is best illustrated by *New York* where the take-title provision which the Supreme Court struck down required *no State regulation* of the conduct of its citizens. Under that law, the States were free to refrain from addressing the problem of radioactive waste generated within their borders. Doing so, however, required the States to take title to that waste. As the *New York* court recognized, the "instruction to state governments to take title to waste, standing alone, [is] beyond the authority of Congress. . . ." 505 U.S. at 176, 112 S. Ct. at 2428. The Supreme Court in no way limited its holding to a situation where Congress compelled the States to regulate their citizens' conduct. Second, even assuming, *arguendo*, that the United States' reading of these

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cases is correct, the DPPA falls within its interpretation of an impermissible congressional command for the States to "regulate." The DPPA prohibits the States in many circumstances from disseminating motor vehicle record information. The DPPA thus clearly regulates the conduct of two classes of the States' citizens: the motor vehicle department employees and those citizens wishing to acquire motor vehicle record information.

The United States also asserts that the DPPA is consistent with the *Garcia* line of cases because it "simply represents a federal regulation of business-related activities that substantially affect interstate commerce, activities in which some States happen to be engaging." *Memorandum In Support Of Motion To Dismiss (Jan. 17, 1997)*, at 17. The Court finds the United States' reliance upon the *Garcia* line of cases to be as misplaced as it was in both *New York* and *Printz*. As *New York* and *Printz* make clear, *see supra*, the *Garcia* line of cases is applicable in a case involving consideration of "whether the incidental application to the States of a federal law of general applicability excessively interfere[s] with the functioning of state governments . . . [and not] where, as here, it is the *whole* object of the law to direct the functioning of the state executive." *Printz*, —— U.S. at ——, 117 S. Ct. at 2383 (emphasis in original). This case is unlike, for example, *Garcia*, where the Supreme Court held that Congress lawfully subjected the States, as employers, to the Fair Labor Standards Act. Here, instead of bringing the States within the scope of an otherwise generally applicable law, Congress passed the DPPA specifically to regulate the States' control of their property (*i.e.*, the motor vehicle records) and to require the

States in turn to regulate their citizens' access to and use of these records.

(4)

In short, as *New York* and *Printz* make clear, "[t]he Federal Government may neither issue directives requiring the States to address particular problems, *nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.*" *Printz*, —— U.S. at ——, 117 S. Ct. at 2384 (emphasis added). Regardless of whatever extent Congress may act under the Commerce Clause in the field of motor vehicle records, it clearly exceeded its power thereunder in enacting the DPPA. Therefore, the Court rejects the United States' reliance upon the Commerce Clause as a basis for justifying the constitutionality of the DPPA.

B.

As an alternative basis the United States argues that Congress also was empowered to enact the DPPA by § 5 of the Fourteenth Amendment, which authorizes it to enact legislation to enforce that amendment. Relying primarily upon *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977), the United States asserts that the Fourteenth Amendment protects the right to privacy by prohibiting the States from publicly disclosing "personal information" contained in State motor vehicle records. As noted, the "personal information" which is restricted by the DPPA is "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability

information. . . ." 18 U.S.C. § 2725(3).[19] The State counters the United States' argument with one point: Congress' power under § 5 is limited to enacting legislation to enforce the guarantees of the Fourteenth Amendment, *see Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732, 102 S. Ct. 3331, 3340, 73 L. Ed. 2d 1090 (1982), and that amendment does not guarantee a right to privacy with respect to the information specified by the DPPA.

(1)

As noted, the United States primarily relies upon *Whalen*, in which the Supreme Court was presented with a constitutional privacy challenge to a State of New York statutory scheme which required the names and addresses of all persons who received prescriptions for certain drugs for which there was both a lawful and an unlawful market to be disclosed to, and recorded by, the State. Framing the issue presented, the Supreme Court stated, *inter alia*:

> Appellees contend that the statute invades a constitutionally protected "zone of privacy." The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters. . . . Appellees argue that [this] interest[ ] [is] impaired by this statute. The mere existence in readily available form of the information about patients' use of Schedule II drugs creates a genuine concern that the information will become publicly known and that it

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[19] The plain language of this non-exclusive statutory definition makes it clear that the DPPA protects a broad range of information.

> will adversely affect their reputations. . . . Thus, the statute threatens to impair . . . their interest in the nondisclosure of private information.

Id. at 598-600, 97 S. Ct. at 876-77 (footnote omitted).

The Supreme Court rejected this argument based on its conclusion that the record did not establish that the security measures associated with the information would be inadequate to prevent its disclosure. *Id.* at 601-02, 97 S. Ct. at 877-78. The Supreme Court concluded by stating:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty *arguably* has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures. Evidence a proper concern with, and protection of, the individual's interest in privacy. *We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data—whether intentional or unintentional—or by a system that did not contain comparable security provi-*

> *sions.* We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.

Id. at 605-06, 97 S. Ct. at 879-80 (emphasis added). In separate concurring opinions, Justices Brennan and Stewart debated whether the government's dissemination of information of the type at issue in *Whalen* would violate a constitutional right to privacy. *Compare id.* at 606, 97 S. Ct. at 879-80 (Brennan, J. concurring) ("Broad dissemination by state officials of such information . . . would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests") *with id.* at 609, 97 S. Ct. at 881 (Stewart, J. concurring) (there is no "general interest in freedom from disclosure of private information").

(2)

Although some federal circuit courts of appeals have questioned whether *Whalen* actually establishes a constitutional right to privacy in the nondisclosure of personal information, *see, e.g., American Fed. of Gov't Employees, AFL-CIO v. Department of H.U.D.*, 118 F.3d 786, 791 (D.C. Cir. 1997) ("We begin our analysis by expressing our grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information"), the Fourth Circuit is not one of them. Instead, the Fourth Circuit has expressly accepted that *Whalen* establishes such a right on at least three occasions: *Taylor v. Best*, 746 F.2d 220, 225 (4th Cir. 1984), *cert. denied*, 474 U.S. 982, 106 S. Ct. 388, 88 L. Ed. 2d 340 (1985); *Walls v. City of Petersburg*, 895

F.2d 188, 192 (4th Cir. 1990), and *Watson v. Lowcountry Red Cross*, 974 F.2d 482 (4th Cir. 1992).[20]

(a)

In *Taylor*, a state prisoner brought a 42 U.S.C. § 1983 claim alleging that his right to privacy was violated because he was compelled to answer questions about his family background. The Fourth Circuit, quoting *Whalen*, stated that "[t]he right to privacy . . . includes an 'individual interest in avoiding disclosure of personal matters.'" 746 F.2d at 225. However, the Fourth Circuit rejected the prisoner's claim, finding that the "compelling public interest in assuring the security of prisons and in effective rehabilitation clearly outweigh[ed] [the prisoner's] interest in maintaining the confidentiality of his family background." *Id.*

(b)

In *Walls*, the Fourth Circuit conducted a more extensive analysis of this privacy right. The plaintiff in *Walls*, who was employed by the City in a law enforcement related capacity, brought a § 1983 privacy claim based on the fact that the City terminated her employment after she refused to answer background questions concerning her family's criminal history, her complete marital history, whether she had ever had homosexual

[20] The Court is aware of Supreme Court and Fourth Circuit cases discussing the right to privacy under the Freedom of Information Act ("FOIA"). These cases have no bearing on the issue presented here because "[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as . . . the question whether an individual's interest in privacy is protected by the Constitution." *United States Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 n. 13, 109 S. Ct. 1468, 1476 n. 13, 103 L. Ed. 2d 774 (1989).

relations, and whether she had any outstanding debts. The Fourth Circuit, after quoting the aforementioned language from *Whalen*, stated: "[p]ersonal, private information in which an individual has a reasonable expectation of confidentiality is protected by one's constitutional right to privacy." 895 F.2d at 192. The Fourth Circuit set forth a general standard for determining whether personal information is entitled to privacy protection: *i.e.*, whether the information "is within an individual's reasonable expectations of confidentiality. The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny." *Id.* The Fourth Circuit then stated that "[t]he right to privacy . . . is not absolute. If the information is protected by a person's right to privacy, then the government has the burden to prove that a compelling governmental interest in disclosure outweighs the individual's privacy interest." *Id.*

The Fourth Circuit proceeded to analyze each of the questions to which the plaintiff objected to determine whether there was a privacy interest implicated and. if so, whether the City's need for the information overrode such interest. The Fourth Circuit, relying upon *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), first concluded that no privacy interest was involved with respect to whether the plaintiff had engaged in homosexual relations. 895 F.2d at 193. With respect to the questions concerning the plaintiff's marital history, the Fourth Circuit stated:

> As explained above, a right to privacy protects only information with respect to which the individual has a reasonable expectation of privacy. *Therefore, to the extent that this information is freely available*

> *in public records, the police should be able to require Walls to disclose the information in this background questionnaire. However, any details that are not part of the public record concerning a divorce, separation, annulment, or the birth of children are private and thus protected.*

Id. (emphasis added and citation omitted). The Fourth Circuit concluded that under this standard the marital history and the family criminal history questions violated no privacy interest. Finally, the Fourth Circuit determined that although "[f]inancial information like that requested in the questionnaire is protected by a right to privacy," the City's interest in obtaining that information for purposes of security overrode the plaintiff's privacy interest. *Id.* at 194.

Notably, the Fourth Circuit indicated that its conclusion concerning the financial information was influenced by the fact that City took "precautions to prevent unwarranted disclosure," thereby weakening the plaintiff's privacy interest, and that "if this type of information had been more widely distributed, [its] conclusion might have been different." *Id.* The Fourth Circuit summed up this point:

> In the past few decades, technological advances have provided society with the ability to collect, store, organize, and recall vast amounts of information about individuals in sophisticated computer files. This database capability is already being extensively used by the government, financial institutions, and marketing research firms to track our travels, interests, preferences, habits, and associates. Although some of this information can be useful and even necessary to maintain order and provide communication and convenience in a complex

> society, *we need to be ever diligent to guard against misuse. Some information still needs to be private, disclosed to the public only if the person voluntarily chooses to disclose it.*

Id. at 194-95 (emphasis added).

(c)

In *Watson*, which was a case based on the transfusion of HIV-contaminated blood, the Fourth Circuit was presented with a claim by the HIV-infected blood donor (through the Red Cross) that requiring him to answer sealed discovery interrogatories concerning his personal life violated his right to privacy to avoid the inadvertent disclosure of his identity and to avoid answering embarrassing and harassing questions. 974 F.2d at 487.[21] The Fourth Circuit rejected these claims primarily because of *Whalen*, in which the Supreme Court determined that the remote possibility of public disclosure of the information was insufficient to establish a basis for a violation of the right to privacy. *Id.* at 487-88.[22] The Fourth Circuit specifically noted that it was "leav[ing] for another day the question of whether court-approved disclosure to a larger universe might violate the donor's privacy rights." *Id.* at 488 n. 9.

In a concurring opinion, Judge Widener stated that he did not believe that the donor had any constitutionally protected privacy right "which would protect

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[21] The Fourth Circuit did not seem overly impressed with these asserted privacy rights. *See* 974 F.2d at 487 ("It is difficult . . . to discern the precise nature of the right that the Red Cross is seeking to protect") and 974 F.2d at 489 ("Whatever privacy interests that are involved are protected by the district court's order").

[22] The donor's identity was to be revealed only to the district court and the parties. 974 F.2d at 487.

him against the full disclosure of his knowledge with respect to the disease in himself and others, as well as his physical condition and everything about the taking and handling of his blood," and that the court was not deciding otherwise. *Id.* at 492. In dissent, Judge Russell stated that he believed that the donor's privacy interest outweighed the plaintiff's right to gain access to the information sought through discovery. *Id.* at 492-93.

(3)

While it is clear from the foregoing cases that at least in the Fourth Circuit there is a constitutional right to privacy in the nondisclosure of some form of personal information, the contours of this right are, as the Third Circuit has characterized, at best "murky." *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, 206 (3d Cir. 1991), *cert. denied*, 502 U.S. 1095, 112 S. Ct. 1171, 117 L. Ed. 2d 417 (1992). Further complicating the matter at hand is the fact that neither *Whalen*, *Taylor*, *Walls*, nor *Watson* involved the precise issue presented here. Each of those cases involved claims by individuals that they should not be *compelled to disclose* certain personal information to a governmental entity because of their right to privacy. Therefore, those cases presented a different question because the United States does not assert here that an individual's privacy right prohibits the States from requiring their citizens *to provide* the "personal information" specified in the DPPA to the State motor vehicle departments. Indeed, the United States (and the DPPA itself) implicitly concedes that an individual's privacy right in this information is outweighed by the States' interest in obtaining this information. The United States instead takes the privacy question one step further; that is, it asserts that the

privacy interest at stake here is the right to have the government not *publicly disseminate* the validly obtained information contained in the State motor vehicle records.

In *Whalen*, *Watson*, and *Walls* the courts specifically avoided any meaningful consideration of whether public dissemination of the personal information involved in those cases may have affected their outcome. *See Whalen*, 429 U.S. at 605-06, 97 S. Ct. at 879-80; *Watson*, 974 F.2d at 488 n. 9; *Walls*, 895 F.2d at 194. The United States has not pointed to any case in which either the Supreme Court or the Fourth Circuit has found a constitutional privacy violation based on public dissemination of personal information by the government. *Cf. Opinion of the Justices to the Senate*, 423 Mass. 1201, 668 N.E.2d 738, 757 (1996) (footnotes omitted) ("The Justices know of no case decided by . . . the Supreme Court where the constitutional right to privacy was found to have been violated by a governmental disclosure of information properly in its possession that the individual would rather not have disseminated").[23]

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[23] In at least one case, the Supreme Court has held that an individual's constitutional right to privacy was not violated by the government's public disclosure of the fact of an arrest:

> [Respondent] claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

Paul v. Davis, 424 U.S. 693, 713, 96 S. Ct. 1155, 1166, 47 L. Ed. 2d 405 (1976). *Paul* predated *Whalen* and it involved the publication of an arrest, an event which unquestionably is considered a matter

From the cases discussed above, it seems certain that an individual's interest in not having certain personal information disseminated by the government is at least equal to, and probably greater than, his interest in merely avoiding disclosure of that information to the government. However the distinction to be made between the two interests likely lies in the balancing to be done between the individual's privacy right and the government's need for disclosure. That is, the government likely would need to demonstrate a greater interest for disseminating personal information than it would for obtaining that same information. Of course, a prerequisite to either balancing process is an initial determination that the information is, in fact, the type of information that is protected under the Constitution.

Therefore, in a case such as this one involving the *Whalen* right to privacy against the nondisclosure of personal information, the Court must, depending on the specific circumstances, potentially conduct a multi-pronged analysis. First, the Court must examine the personal information at issue to determine whether, in fact, it is within a person's "reasonable expectation of confidentiality" and thus entitled to the constitutional right of privacy. If the information is not entitled to such protection, the inquiry ends. If the information is entitled to such protection, the Court next must determine whether the State's interest in obtaining the information from the individual outweighs the individual's privacy interest. *See Walls*, 895 F.2d at 192. Again, if the answer here is negative, then the inquiry ends. However, if the answer is affirmative, then the Court must proceed to determine whether the State's

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of public interest. *Paul* therefore is not particularly pertinent to this case.

interest in allowing the information to be made public outweighs the individual's privacy interest. As noted, this latter inquiry sorely requires the States to present a higher interest than they must show to obtain personal information.

The Court's reason for explaining this analysis is based on the record presented in, and the posture of, this case. As noted, the DPPA implicitly recognizes that to whatever extent there is a privacy interest in any of the personal matters required to be disclosed by individuals to State motor vehicle departments, the States' interest in obtaining the information outweighs that privacy interest.[24] While there is thus no need for the Court to engage in balancing the States' interest in obtaining personal information against the individuals' right of privacy, there is a need for the Court to balance the States' interest in publicly disseminating the motor vehicle record information against the individuals' privacy interest. Unfortunately for the State, it has offered no specific interest (other than historical) to justify its need to allow its motor vehicle records to be publicly disseminated. Therefore, the entire inquiry for purposes of this case involves only the threshold question of whether the information protected by the DPPA is the type of personal information for which the Constitution recognizes a right to privacy.

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[24] Of course, any specific information sought by a State motor vehicle department could potentially be challenged under *Whalen*. However, that is not an issue before the Court. The Court notes that Congress' enactment of numerous exceptions to the purported right of privacy protected by the DPPA weighs against the United States' position that there is a protected privacy interest involved here.

(4)

In this Circuit, *Walls* is the key case for making this inquiry. As noted, the Fourth Circuit stated in *Walls* that "the first step in determining whether the information sought is entitled to privacy protection . . . [is] whether it is within an individual's reasonable expectations of confidentiality. The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny." 895 F.2d at 192. In ruling on the specific information in that case, the Fourth Circuit further indicated that information that is freely available in public records is not protected by a right to privacy. *Id.* at 193-94.[25]

As the Court has previously noted, the DPPA's definition of "personal information" that is protected from disclosure thereunder is extremely broad: personal information is "information that identifies an individual . . . ." 18 U.S.C. § 2725(3). To be sure, the statutory definition lists several things which are to be considered as being within the category of "information that identifies an individual," but the definition is facially open-ended. This is significant because it

[25] Recently, in *Russell v. Gregoire*, 1997 WL 539074, *16 (9th Cir. Sept. 4, 1997), the Ninth Circuit rejected a constitutional privacy challenge to the State of Washington's version of "Megan's law," finding that "any such right to privacy, to the extent that it exists at all, would protect only personal information . . . [and] [t]he information collected and disseminated by the Washington statute is already fully available to the public and is not constitutionally protected. . . ." The Ninth Circuit noted that although there were two types of information that would be collected and/or disseminated under the law that were not fully available to the public—the offender's residence and employer—"[n]either of these two items are [sic] generally considered private." *Id.*

straightaway undercuts the United States' position that the DPPA protects the privacy interest recognized by the Constitution.[26] Under the United States' view, virtually all information maintained by a State in its motor vehicle records—except for those specific items that the DPPA excludes—would have to be considered, *automatically*, as being within the constitutional right to privacy.[27] Of course, this cannot be accurate, at least in the Fourth Circuit, because *Walls* clearly establishes, for example, that information that is otherwise freely available in public records is not constitutionally protected.[28]

Once it is accepted that not all "personal information" contained in the records of the State motor vehicle departments can be considered constitutionally protected, the question becomes whether any of this information is so protected. Instead of engaging in pure speculation as to what information may arguably fall within the DPPA's broad ambit, the Court will limit its focus to those specific examples identified in the DPPA as being "personal information." In doing so, the Court

[26] At oral argument the United States asserted that each type of information protected by the DPPA is equal with respect to the constitutional privacy interest.

[27] It is likely that the United States would argue that the term "personal information" must be given a broad construction.

[28] While neither party has presented the Court with information establishing what *any* State keeps in its motor vehicle records, it is conceivable that the marital status of an individual, either directly or indirectly as a "next of kin" requirement, is an item of information which a State motor vehicle department may now (or in the future could) require for notification purposes in the event of an automobile accident. Marital status is, as noted, the type of information which the Fourth Circuit in *Walls* held is not constitutionally protected under the right to privacy.

may quickly dispose of five items specified in the DPPA: name, driver identification number, address, phone number, and photograph. These are clearly not the type of intimate matters for which individuals have a "reasonable expectation of confidentiality" that the Constitution protects.[29]

The DPPA also specifies that "medical or disability information" is "personal information" that comes within its scope. While the Court has no doubt (in light of Circuit precedent) that individuals have a privacy interest in some—perhaps most—medical or disability information, there clearly is some medical or disability information for which there is no privacy interest. For example, the fact that an individual wears eyeglasses (a likely item of information in motor vehicle records) is not an intimate personal matter since it is obvious to anyone who sees that individual. Likewise, the fact that a person needs to use a wheelchair (also likely to be in motor vehicle records)[30] is an obvious item of disability information which does not involve an intimate matter. There is no need to belabor this point with

[29] In South Carolina, for example, an individual's name, address, driver identification number, and photograph appear on the driver's license, which has become a common source of information for a variety of purposes (*e.g.*, proof of age and identity). Moreover, an individual's name and address is generally readily attainable from a variety of sources, including public records (*e.g.*, voting registration lists, mortgage records). Finally, an individual can claim no privacy interest in his appearance, which is, of course, reflected in the photograph.

[30] The State of South Carolina issues disability license tags which clearly identify persons who have certain disabilities that qualify them for that tag. Not only do these tags expose the fact of a disability to the public, but their issuance also makes it likely that, for example, an individual's need to use a wheelchair is contained in the motor vehicle records.

additional examples. The phrase "medical or disability information" is so broad that it encompasses a seemingly infinite set of information, only some of which is in fact entitled to privacy protection. Therefore, although the Court has contemplated whether the "medical or disability information" provision could be retained and upheld while other items specified in the DPPA were severed therefrom, the Court finds that the breadth of the provision makes it practically unworkable. Since the Court has no basis in this record to establish the parameters of what "medical or disability information" is entitled to constitutional protection, it is certainly not reasonable to expect laypersons subject to civil and criminal sanction under the DPPA to be able to make this determination on an *ad hoc* basis.

The only remaining item of information specified in the DPPA is an individual's social security number. Regardless of the extent, if any, to which there is a *constitutional* right to privacy in social security numbers, the Court finds that retaining this portion of the DPPA while severing the remainder is not warranted. The procedural history of the DPPA makes it clear that its main purpose was to prohibit the disclosure of names and addresses in order to prevent persons from being identified by the motor vehicle records. While Congress added social security numbers to the list of information which is covered by the DPPA, that information clearly seems peripheral to the DPPA's purpose. Accordingly, the Court finds that the DPPA will not "function in a manner consistent with the intent of Congress," *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685, 107 S. Ct. 1476, 1480, 94 L. Ed. 2d 661 (1987), if the social security number portion is retained while the remainder is severed.

(5)

In short, the Court finds that Congress' purported reliance on § 5 of the Fourteenth Amendment in enacting the DPPA is misplaced because the United States has failed to establish that the DPPA is legislation which properly enforces that amendment's guarantee of the right to privacy. To be sure, some of the matters that the DPPA protects may be considered "personal" in a general sense. However, the question is whether these matters are entitled to privacy protection under the Constitution. On the record presented, the Court is unable to find that they are.

III

Based on the foregoing the Court hereby **ORDERS** on this the 11th day of September, 1997, at Columbia, South Carolina, that the United States' motion to dismiss be **DENIED**, the State's motion for summary judgment be **GRANTED**, and that the United States be **PERMANENTLY ENJOINED** from enforcing the DPPA in the State of South Carolina. The Court **DIRECTS** the Clerk to telefax (or otherwise provide immediate access to) a copy of this Order to the parties immediately upon filing. The Court **DISMISSES** all claims not addressed herein as being moot.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 97-2554
CA-96-3476-3-19

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA; STATE OF SOUTH CAROLINA, PLAINTIFFS-APPELLEES

AND

SOUTH CAROLINA PRESS ASSOCIATION; VIRGINIA PRESS ASSOCIATION; NORTH CAROLINA PRESS ASSOCIATION; WEST VIRGINIA PRESS ASSOCIATION; MARYLAND/DELAWARE/DISTRICT OF COLUMBIA PRESS ASSOCIATION; NEWSPAPER ASSOCIATION OF AMERICA; SOCIETY OF NEWSPAPER EDITORS, INTERVENORS-PLAINTIFFS

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

BETTER GOVERNMENT BUREAU, INCORPORATED; STATE OF ALABAMA; STATE OF OKLAHOMA; STATE OF IDAHO; STATE OF NORTH CAROLINA, AMICI CURIAE

ON PETITION FOR REHEARING AND REHEARING EN BANC

Appellants filed a petition for rehearing and rehearing en banc.

Judges Williams, Hamilton and Senior Judge Phillips voted to deny the petition for rehearing.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of judges in active service in favor of rehearing en banc.

Judges Murnaghan, Ervin, Hamilton, Michael, Motz and King voted to rehear the case en banc, and Judges Wilkinson, Widener, Wilkins, Niemeyer, Luttig, Williams and Traxler voted against rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Williams for the Court.

For the Court,

/s/ PATRICIA S. CONNOR
PATRICIA S. CONNOR
CLERK

APPENDIX D

The Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725, provides:

§ 2721. Prohibition on release and use of certain personal information from State motor vehicle records

(a) IN GENERAL.—Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.

(b) PERMISSIBLE USES.—Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal

information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the motor vehicle department has provided in a clear and conspicuous manner on forms for issuance or renewal of operator's permits, titles, registrations, or identification cards, notice that personal information collected by the department may be disclosed to any business or person, and has provided in a clear and conspicuous manner on such forms an opportunity to prohibit such disclosures.

(12) For bulk distribution for surveys, marketing or solicitations if the motor vehicle department has

implemented methods and procedures to ensure that—

(A) individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses; and

(B) the information will be used, rented, or sold solely for bulk distribution for surveys, marketing, and solicitations, and that surveys, marketing, and solicitations will not be directed at those individuals who have requested in a timely fashion that they not be directed at them.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) RESALE OR REDISCLOSURE.—An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b) (11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b) (11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the

information will be used and must make such records available to the motor vehicle department upon request.

(d) WAIVER PROCEDURES.—A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

§ 2722. Additional unlawful acts

(a) PROCUREMENT FOR UNLAWFUL PURPOSE.—It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) FALSE REPRESENTATION.—It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

§ 2723. Penalties

(a) CRIMINAL FINE.—A person who knowingly violates this chapter shall be fined under this title.

(b) VIOLATIONS BY STATE DEPARTMENT OF MOTOR VEHICLES.—Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a

civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

§ 2724. Civil action

(a) CAUSE OF ACTION.—A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) REMEDIES.—The court may award—

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

§ 2725. Definitions

In this chapter—

(1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

(2) "person" means an individual, organization or entity, but does not include a State or agency thereof; and

(3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.